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REPORTS OF CASES

HEARD AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

MARCUS T. HUN, REPORTER.

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The attention of the profession is called to the fact that the Court of Appeals in many cases decide an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the General Term does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. — [R&P.

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Cases
DETERMINED IN THE
FIFTH DEPARTMENT
AT
GENERAL TERM,
*** October, 1890.**

**BARTHOLOMEW FETES, RESPONDENT, v. ADELAIDE
VOLMER, APPELLANT, IMPEADED WITH OTHERS.**

Surrogate — power of a surrogate, the successor of one who has admitted a will to probate, to certify a copy of the original will and to sign the record of probate — variance between such copy and the record of the probate of the will.

Where a will has been admitted to probate by a surrogate, a certified copy of the original will on file in that office, made by a successor of the surrogate by whom such will was admitted to probate, as well as the signature of such successor to the record of the probate, of the will, are made valid by chapter 155 of the Laws of 1890.

Where there is a variance between the record in the surrogate's office of a will admitted to probate therein and the record in the office of the county clerk, where a certified copy of such will has been recorded, the question as to which record is correct may be determined by a resort to the attending circumstances.

APPEAL by the defendant Adelaide Volmer from an interlocutory judgment of the Supreme Court, entered in the office of the clerk of Erie county on the 30th day of April, 1890, with notice of an intention to bring up for review, upon such appeal, an order made at the Erie Special Term on the 21st day of April, 1890, and entered, April 30, 1890, whereby the report of a referee, made in the

* Continued from volume LVII.

above-entitled action, was confirmed and an interlocutory judgment was directed to be entered; and also an order, made at the Erie Special Term on the 10th day of February, 1890, whereby it was "ordered that the judgment, entered on January 22, 1890, be, and the same is, hereby vacated," etc.

The action was brought to obtain a judgment of the court, first, establishing and adjudicating the respective rights of the several parties to the action, in and to certain real estate described in the complaint therein; and, second, ordering and directing that the said property be partitioned among the parties according to their respective rights, and in case a partition thereof could not be made that the same be sold.

The case was tried before a referee, who made a report as to the interests and rights in the premises of the several parties to the action, by which it appeared, among other things, that the plaintiff was the owner, under and by virtue of the will of his father, Louis Fetes, of an equal undivided one-sixth part of the real estate described in the complaint, and also of an equal undivided one-thirty-sixth part of the same as the heir-at-law of Celestine Fetes.

The principal question on this appeal related to the discrepancy existing between the record in the Erie county surrogate's office, of the will of Louis Fetes certified by one Abram Thorn, the successor of Charles D. Norton, the surrogate by whom such will was admitted to probate, and the record in the Erie county clerk's office of a copy of the original will recorded in that office, which copy was also certified by Abram Thorn and contained the name of Bartholomew Fetes as a beneficiary thereunder, which did not appear in the record of the will in the surrogate's office.

Eugene V. Chamberlain, for the appellant.

Giles E. Stilwell, for the respondent.

MACOMBER, J.:

On the former appeal in this case (reported in 28 N. Y. St. Rep., 817, and 8 N. Y. Supp., 294), it was held that a failure to serve properly two of the necessary parties for a complete partition of the premises described in the complaint was fatal to the interlocutory judgment, and such judgment was accordingly reversed. Since

that decision the insufficiencies in the practice have, apparently, all been supplied by proper appearances of absentees and otherwise, so that we have before us at the present hearing only one question of moment, and that relates wholly to the merits of the action.

The right of the plaintiff to maintain partition of the premises in question is denied by the appellant upon the ground that the plaintiff, at the time of the beginning of the action, had no title to or interest in these lands. All of the parties claim under Louis Fetes, who died on the 24th day of July, 1855, leaving a last will and testament disposing of both real and personal property, whereby he devised to his widow a life interest in the lands described in the complaint, with the remainder over to his children. The will was duly admitted to probate on the 26th day of December, 1855, by the surrogate of the county of Erie. The point in controversy is, whether the plaintiff was named in the will as one of the children of the deceased. The will was recorded in the surrogate's office some time between December 26, 1855, and December 31, 1855, when the term of the surrogate expired by limitation. His successor signed a certified copy of the will January 8, 1856, and annexed thereto a paper purporting to be a certificate to the effect that it had been so admitted to probate by his predecessor, and that the same was then on file in the Surrogate's Court. This instrument was recorded in the Erie county clerk's office in the year 1871, as a will of real estate. The original will was lost, and the question as to the contents thereof is to be determined mainly by the copy thereof as recorded in the surrogate's office, and the other copy thereof as recorded in the county clerk's office. The copy set out in the books of the surrogate omits the name of the plaintiff as one of the beneficiaries under the will, while the one recorded in the county clerk's office contains his name, with five others, all the children of the testator.

It is probable that the surrogate, being pressed for time, had not an opportunity, before surrendering his office, to compare the copy as it now appears in his book with the original. This assumption finds corroboration in the fact that such copy in the surrogate's book bore no certificate or mark showing that it had been compared with the original will. But the copy, as recorded in the county clerk's office, bears upon its face such evidence, as it has the usual certificate

annexed. The attestation usually determines the question whether the document is the whole or a part only of the original. (*Voris v. Smith*, 13 Serg. & R., 334.)

But it is claimed that the certificate of the surrogate was a nullity, inasmuch as the statute under which the same purports to have been given relates only to the certificates of the successors in office where there has been a vacancy, and that the appointees of the unexpired term alone are authorized to complete the unfinished business of their predecessors (2 R. S., 223, § 11), while those succeeding by election for a full term have not such power. It would seem that there was an omission on the part of the legislature in not making the statute broad enough to cover the right of a successor by election to complete the unfinished business of his predecessor. It is probable, as the referee says, that the legislature in enacting this provision had in view the simple act of signing and certifying records and documents presumptively legal and valid. In other words, such power may have been assumed to have theretofore existed; and the object of this provision was simply to authorize the successor of a surrogate, whose office had been suddenly terminated by death, incapacity or removal, to continue and complete the business begun and pending before him.

The provisions of the statute contemplated that every public officer should complete his official business before retiring at the end of his term. But it by no means follows that the surrogate had not the power to certify records which he found in his office. Under the Revised Statutes, as originally enacted, a surrogate could exercise no powers except those which were expressly conferred upon him. (2 R. S., 220, § 1.) By chapter 460 of Laws of 1837, however, these restrictions were removed; at least to some extent, and he was empowered to administer justice in all matters according to the provisions of the statutes of the State, and there were conferred upon him all the powers which were necessary and incidental to enable him to discharge the duties of his office. (*Brick's Estate*, 15 Abb., 32.) He has the power to exemplify under his seal of office all transcripts of records, papers or proceedings therein, and the same must be received in evidence in all courts with the like effect as the exemplifications of the records, papers and proceedings of courts of record. (2 R. S., 221, § 6.) It is quite probable that the copy certified by the surrogate, and

which was recorded in the county clerk's office, was taken from the original will as filed, and not from a copy thereof as entered in the books of the surrogate.

So much only need be said upon the question of the probabilities as to which record was the true one, irrespective of the admissibility of either of them in evidence, whether as primary or secondary proof. Under 2 Revised Statutes (58, §§ 14 and 15), this record would not be admitted as primary evidence, inasmuch as it does not contain "the proofs and examinations so taken." (*Morris v. Keyes*, 1 Hill, 540; *Caw v. Robertson*, 5 N. Y., 132; *Hill v. Crockford*, 24 id., 128.) The enabling act, passed by the legislature in 1870, chapter 74, provides as follows: "Section 1. All acts hitherto, of surrogates and officers acting as such in completing, by signing in their own names the unsigned and uncertified records of wills, and of the proofs and examinations taken in the proceedings of probate thereof, before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements." This power, however, it will be observed, was restricted to cases where the record of the wills contained the proofs and examinations as required by the provisions of the Revised Statutes. (*Hill v. Crockford*, 24 N. Y., 128.) Whatever the insufficiencies of the enabling act of 1870 may be, no question can be made of the act of 1890, chapter 155, which confirms all acts of surrogates in certifying the records of their office, and the same clearly covers the record of the will in the case before us. While it is true this act was passed since this controversy arose, and even since the case was argued before this court, yet such are its comprehensive terms that it must be deemed to apply to all cases existing and undetermined in the courts. A statute commonly speaks only for the future, and where vested rights are involved the legislature cannot affect the past or the present, but there are many remedial statutes that mainly affect past transactions, and are enacted for that purpose. Statutes confirming illegal or irregular proceedings of various public officers are of this character, and can have no relation to other than past transactions. (1 Kent's Com., 455; *Foster v. Essex Bk.*, 16 Mass., 245; *Underwood v. Lilly*, 10 S. & R., 97; *People v. Supervisors*, 43 N. Y., 136; *People ex rel. Collins v. Spicer*, 99 id., 233.)

Under these statutes the certificate, added to the record of the will in the surrogate's office, was confirmed, as also was his certificate that the will delivered to him by his predecessor as being the original will from which the copy was made, and upon the faith and credit of which he certified the copy. The copy of the will in the book of deeds seems to us to be precisely of the same degree of evidence as the copy of it in the record of wills, and that, under these enabling acts, they both became primary evidence of the contents of the will itself. No greater effect can be given to the one than is given to the other of these records. Each is a copy of the same will.

It is a noteworthy fact that there is no evidence that there was any purpose, on the part of the testator, to withhold from the plaintiff an equal share in the residuary estate after the expiration of the life interest of the testator's wife. This fact, therefore, coupled with the other, namely, that in the book of wills the record had not been signed, and so probably not compared with the original will, and the further fact that Bartholomew Fetes' name appears in the record as contained in the book of deeds in the clerk's office, presents a case where the more reasonable inference is that the plaintiff was, in fact, named in the will, and that, consequently, he can maintain this action. These irreconcilable documents present an instance of conflict of evidence only, and the case must be disposed of substantially in the same manner as other cases where the evidence is conflicting. Where two inconsistent copies of the same will, both duly certified, the one from the records of the surrogate's office and the other from the records of the county clerk's office, are in evidence, the original will being lost, and both parties to the controversy claim under the probate of such lost will, the court or tribunal passing upon the facts may resort to the attending circumstances, and if there is no other evidence, determine which record is the true one. Under this rule there is a clear preponderance of the evidence in favor of the plaintiff.

It follows, therefore, that the interlocutory judgment appealed from should be affirmed, with costs to the respondent.

DWIGHT, P. J., and CORLETT, J., concurred.

Interlocutory judgment appealed from affirmed, with costs to the respondent, payable out of the fund.

HERMAN BEECKEL, AS ADMINISTRATOR, ETC., OF LEOPOLD
HAFFENNEGGER, DECEASED, PLAINTIFF, v. THE IMPE-
RIAL COUNCIL OF THE ORDER OF UNITED
FRIENDS, DEFENDANT.

*Relief fund of a mutual benefit association — when it goes to the heirs-at-law free from
the claims of creditors of the deceased member.*

A certificate, issued by a society known as the Imperial Council of the Order of United Friends, provided that the party named therein was "entitled to all the rights and privileges of such membership, and a benefit of not exceeding one thousand dollars from the relief fund, which sum shall, at death, be paid to subject to will subject to the laws, rules and regulations of the order."

The articles of incorporation of the council provided for the establishment of "a relief fund from which a member of this association, who has complied with all its laws, rules and regulations, or a person or persons by such member lawfully designated, or the legal heir or heirs of such member, may receive a benefit in a sum not exceeding three thousand dollars; ' and further provided, "Each applicant shall enter, upon his application, the name or names of the person or persons to whom he or she desires the benefit to be paid in case of death;" and, further, that in case of the death of all the beneficiaries selected by the member before the decease of such member, and no other disposition being made thereof, "the benefits shall be paid to the next of kin of the deceased member dependent upon him or her, and if no person or persons shall be entitled to receive such benefits by the laws of the order it shall revert to the relief fund."

Held, that a creditor of the deceased member, who had taken out letters of administration upon his estate, could not maintain an action against the Imperial Council for the recovery of the money payable under such certificate.

That, in default of a designation, either in his lifetime or by will, by the deceased member, the amount payable under such certificate went to his heirs-at-law.

EXCEPTIONS ordered to be heard in the first instance at the General Term, and judgment to be in the meantime suspended, after a trial had at the Monroe County Circuit, before the court and a jury, at which a verdict was rendered in favor of the plaintiff against the defendant by direction of the court for the sum of \$1,082.

The action was brought by a creditor of a deceased member of the Imperial Council of the Order of United Friends, who, as such creditor, had applied for and obtained letters of administration upon the estate of such deceased member to recover the amount payable

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to his intestate from the Imperial Council of the Order of United Friends by reason of the membership therein of such intestate.

W. A. Sutherland, for the plaintiff.

Alfred Stekler, for the defendant.

MACOMBER, J. :

The defendant is organized under the act of the legislature passed May 12, 1875 (chap. 267), entitled "An act for the incorporation of societies or clubs for certain lawful purposes," commonly known as the club act. It has the right to issue certificates of life insurance to its members under certain conditions.

Upon the 1st day of February, 1887, it issued a certificate to the plaintiff's intestate, Leopold Haffennegger, in which it agreed to pay, on his death, the sum of \$1,000. No beneficiary was mentioned in the certificate other than the insured, but there was a provision that this amount should be paid "subject to will," meaning, obviously, that the member could bequeath the demand to any person. The certificate is as follows :

"This certificate issued by the authority of the Imperial Council of the Order of United Friends, duly incorporated under the Laws of the State of New York, witnesseth, that Leopold Haffennegger, a member of Hercules Council, No. 241, located at Rochester, in the State of New York, is a beneficiary member of the Order of United Friends, and entitled to all the rights and privileges of such membership and a benefit of not exceeding one thousand dollars from the relief fund, which sum shall, at death, be paid to.....subject to will.....subject to the laws, rules and regulations of the order."

Section 3 of the articles of incorporation of the defendant is as follows: "Third. The principal objects of this association shall be: To unite and combine the efforts of all its members; to improve the condition of its membership, morally, socially and materially, by timely counsel and instructive lessons; to encourage each other in business and give assistance in obtaining employment; to promote benevolence and charity by establishing a Relief Fund, from which a member of this association who has complied with all its laws, rules and regulations, or a person or persons by such member law, fully designated, or the legal heir or heirs of such member may

receive a benefit in a sum not exceeding three thousand dollars (\$3,000.00), which shall be paid when a member, by reason of disease or accident shall become permanently disabled from following his or her usual or some other occupation, or upon a satisfactory evidence of the death of such member, and when all the conditions regulating such payment have been complied with."

Section 2 of law three of its constitution and by laws is as follows: "Each applicant shall enter upon his application the name or names of the person or persons to whom he or she desires the benefit to be paid in case of death; subject, however, to such future disposal of the benefits as a member may thereafter direct upon returning to the Imperial Recorder the original certificate for record of change."

Section 5 of that law provided a payment to the surviving beneficiary in case more than one were designated.

Section 6 provides, that in case all the beneficiaries selected by the member should die before the decease of such member and no other disposition be made thereof, "the benefits shall be paid to the next of kin of the deceased member dependent upon him or her; and if no person or persons shall be entitled to receive such benefits by the laws of the Order, it shall revert to the Relief Fund."

The plaintiff is a creditor of Leopold Haffennegger, but is in no way related to the deceased, and he was not designated as a beneficiary in this certificate or policy. As such creditor he procured himself to be appointed administrator of the estate of Haffennegger, and he brings this action to recover the thousand dollars secured by such certificate. Haffennegger, who died intestate on the 17th day of April, 1887, left him surviving a wife and three children. At the trial the defendant moved to dismiss the complaint upon the ground that the plaintiff had no standing under the certificate and the constitution and laws of the society, which motion was denied. At the close of the case also, after showing that the children of the deceased had brought an action upon the same certificate against this company, the motion was renewed and again denied, and a verdict was ordered by the court for the plaintiff in the amount claimed.

We think that this action cannot be maintained. The plaintiff has no right or title to the money to be procured upon this certificate. He is a creditor only of the deceased, and not a relative.

Under the provisions of the laws and regulations, already quoted, it is clear that it is no part of the business enterprise of the defendant to provide a fund for the payment of debts. Its regulations are so specific and clear upon this subject as hardly to require extended discussion. The assured had the right to designate absolutely the beneficiary who should receive the full benefit of the insurance after his death; but this was subject to the right of a further disposition thereof by will. In case, however, of a failure to make a designation either in his lifetime or by will, the moneys were to be paid to his heirs-at-law, and, if they were not all similarly situated, to those only in need of assistance. Furthermore, in case of a total failure or extinction of beneficiaries named, or next of kin dependent upon the assured, the fund did not revert to the company, but went into a general fund, known as the "Relief Fund," for the benefit of the insured of this class. Haffennegger left heirs-at-law; and, for aught that appears, they have among themselves equal claims upon the fund. Under the laws governing the defendant these persons were entitled to the insurance moneys.

This conclusion is in accordance with the case of *Hellenberg v. District No. 1 of I. O. of B. B.* (94 N. Y., 580). In that case by the by-laws of the company it was provided that upon the death of a member the sum of \$1,000, collected by contribution from all the lodges in the district, should be paid to the wife of the deceased, if living, and if dead to his children, and if there were none, then to such person as he may have designated prior to his death. The testator, having neither wife nor children, designated his mother as the beneficiary. His designation described the payments directed as "the one thousand dollars my heirs are to receive." His mother died before the insured and no other designation was made. It was held, in an action to recover that sum, that the testator had no interest in the fund which could descend, or upon which a will could operate; but simply a power of appointment, which, if not exercised prior to his death in the manner specified, became inoperative; and that as the beneficiary named died before him, and no other designation was made as prescribed, the defendant was not bound to pay to any one. In that case the endowment reverted to the Order under the peculiar provision of the charter; but in the case now before us there is no such reversion, but a retention of the same for general relief.

The case of *Bishop v. Grand Lodge, etc.* (112 N. Y., 627), is pressed upon our attention as holding the contrary; but that decision is entirely consistent, in our judgment, with the principles above mentioned. At the trial thereof no question was made but that if any person could recover Mrs. Bishop, as administratrix, might do so, inasmuch as she was the actual beneficiary under the certificate. But the feature distinguishing the Bishop case from the one at bar is, that by the terms of the agreement in that case the endowment was payable to the families, heirs or legal representatives of the deceased members. In the case before us there is no provision for the payment in any possible event to the legal representatives of the deceased. The deceased had no vested interest in the fund itself which can be made available to his personal representatives after his death.

Exceptions allowed and verdict set aside, with costs to be paid by the plaintiff personally; and inasmuch as, if these views are correct, a new trial will be unavailing to the plaintiff, the complaint should be dismissed.

DWIGHT, P. J., and CORLETT, J., concurred.

Exceptions allowed and verdict set aside, with costs to be paid by the plaintiff personally, and the complaint dismissed.

HARRY D. CRAM AND OTHERS, BY GUARDIAN, RESPONDENTS, v.
THE EQUITABLE ACCIDENT ASSOCIATION OF
BINGHAMTON, N. Y., APPELLANT.

Mutual accident association—recovery under a certificate thereof—necessity of evidence as to the amount which an assessment would produce—effect of misrepresentations in the application.

A certificate of membership in an accident association provided that the association would pay to the heirs of the assured "the principal sum, not exceeding four thousand dollars, realized upon an assessment, in accordance with the provisions of section one of article six of its by-laws as printed on the back of this certificate."

In an action brought to recover upon this certificate it appeared that the assured had died, and that the plaintiffs had demanded of the association that an assess-

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ment be made for the purpose of paying the loss resulting from the death of the assured, but that the defendant refused to make such assessment. There was no allegation in the complaint, nor evidence given on the trial, as to what amount would have been realized from such an assessment, if one had been made. The court instructed the jury that if they found in favor of the plaintiffs they should find for the full amount of \$4,000.

Held, in the absence of evidence showing what amount would have resulted from the making of an assessment, in accordance with the by-laws of the association, that such instruction to the jury was error.

The application for the insurance was, by the terms of the certificate, subject to the condition "that all the statements and representations contained in the Application for this Certificate are warranted to be correct and true in all respects, and if this Certificate * * * has been * * * obtained through misrepresentation * * * then the same shall be absolutely null and void."

This application for the certificate required an answer to the following question "4th. Occupation? If more than one, name them all?" Which was answered, "Oil producer;" and also to the following question: "State the duties required of you under that occupation." Which was answered: "Supervising only." The undisputed evidence was to the effect that the insured had a small lease of oil lands, upon which he had two or more wells, which he managed and operated himself, doing every part of the work alone, which could be done by one man; that he attended his own boilers, ran his own engine, pumped his own wells, "pulled" his wells and made his own repairs without assistance, except upon extraordinary occasions.

Held, that the representation made by the assured was incorrect, and that the certificate was, for that reason, void.

EXCEPTIONS ordered to be heard in the first instance at the General Term, the entry of judgment upon the verdict in favor of the plaintiff to be in the meantime suspended.

The trial was had at the Cattaraugus County Circuit on the 4th day of September, 1889, before the court and a jury, at which a verdict was rendered in favor of the plaintiffs in the sum of \$4,000, with interest from December 10, 1887.

The action was brought for the purpose of recovering the amount claimed to be due from the defendant upon a certificate of membership issued by the defendant to one Harry D. Cram, since deceased, by the terms of which, in the event of the death of said Harry D. Cram, occasioned in a manner specified in the certificate, the defendant undertook to pay to his heirs "the principal sum, not exceeding four thousand dollars, realized upon an assessment, in accordance with the provisions of section one of article six of its by-laws as printed on the back of this certificate."

D. Murray, for the motion.

J. R. & M. B. Jewell, opposed.

DWIGHT, P. J. :

The action was on a certificate of membership of the defendant association, issued to one Harry D. Cram, since deceased, by which, in the event of the death of the member, occasioned in a manner specified, the defendant undertook to pay to his heirs "the principal sum, not exceeding \$4,000, realized upon an assessment, in accordance with the provisions of section 1 of article 6 of its by-laws as printed on the back of this certificate;" and the section referred to prescribed the time and mode of making such assessment. The death of the member occasioned in the manner specified; the service of notice of the death, as required, and of due proofs of loss, were alleged and proved and were not disputed. The plaintiffs also alleged and proved that, after the expiration of the time prescribed by the by-laws, the plaintiffs duly demanded of the defendant that an assessment be made for the purpose of paying the loss, but that the defendant refused to make such assessment. There was no allegation in the complaint nor evidence on the trial of what amount, if any, would or might have been realized from such an assessment if one had been made.

At the close of the plaintiffs' case the defendant moved for a nonsuit on the ground of the lack of evidence of the character last mentioned, and that motion was renewed and a motion made for the direction of a verdict for the defendant at the close of the evidence, on the same ground, all of which motions were denied and the defendant excepted. These rulings of the court were undoubtedly correct, and the several exceptions of the defendant thereto unavailing, because upon the undisputed evidence (the validity of the certificate being, for this purpose, conceded) the defendant had been guilty of a breach of its contract to make an assessment, and the plaintiffs were entitled to recover at least nominal damages.

But the court having submitted to the jury to find upon another question of fact, which will be noticed later, instructed them that if they found in favor of the plaintiffs, they should find for the full amount of \$4,000. To this instruction the defendant excepted, and

the exception was doubtless well taken and must entitle the defendant to a new trial. Whatever the evidence, short of proof of an amount actually realized on an assessment, the question of the measure of damages must have been a question for the jury. (*O'Brien v. The Home Benefit Society*, 117 N. Y., 310.) In the case cited the court say: "The plaintiff was, therefore, entitled to recover something, and what was the measure of his damages? Just what he lost by the defendant's breach of its contract. He was entitled to have an assessment made and collected, and the proceeds thereof paid to him. What was the contract worth to him, *and what would the assessment have produced for him?* It was incumbent upon the plaintiff to give evidence which would enable the jury to answer these questions." In that case the evidence, which was held sufficient for the purpose, is not disclosed in the case as reported, but, by reference to the record, we find that it consisted of the last previous annual report of the defendant to the insurance department, showing, among other things, the number of certificates outstanding in each class and, consequently, the number of persons liable to assessment for a given amount, to pay the plaintiffs' claim.

In this case, on the other hand, there was, as we have said, no evidence showing or tending to show how much an assessment, made in accordance with the by-laws of the defendant, would have produced for the benefit of the plaintiffs, and, therefore, no evidence upon which the jury could have based a verdict in their favor for more than nominal damages. (*O'Brien v. Home Benefit Society*, *supra*; *Martin v. Equitable Accident Assn.*, 29 N. Y. St. Rep., 421, and the cases there cited.)

The other question in the case, already referred to, arises upon a statement in the application in writing for membership, made by the deceased. The undertaking of the defendant, contained in the certificate, was, by its terms, subject to several provisions and conditions, among which was "the express agreement that all the statements and representations contained in the Application for this certificate are warranted to be correct and true in all respects; and if this certificate * * * has been * * * obtained through misrepresentation * * * then the same shall be absolutely null and void." The application was in evidence; it contained, among other questions to which full and explicit answers were required to be

given, the following: "4. Occupation? If more than one, name them all." Which was answered: "Oil producer." Also the question: "State the duties required of you under that occupation." Which was answered: "Supervising only." The answer of the defendant averred that this statement or representation was untrue, and that the breach of the warranty in this respect rendered the certificate null and void.

The undisputed evidence on this branch of the case was to the effect that the insured had a small lease of oil lands upon which he had two or more wells which he managed and operated himself, doing every part of the work alone which could be done by one man. That he tended his own boilers, ran his own engine, pumped his own wells, "pulled" his wells and made his own repairs, without assistance, except upon extraordinary occasions. Some testimony was given, first on the part of the plaintiffs, under the defendant's objection, and afterwards on the part of the defendant, for the purpose of showing what was meant or understood in the oil country, by the terms "supervisor" or "supervising" of oil wells or territory. It may well be questioned whether expert testimony was admissible to explain the meaning of terms of such common use and plain significance as those in question. But being admitted, it proved nothing beyond what was apparent before and might as well have been conceded, namely, that the insured was an oil producer supervising his own business. The fault of his application was that it represented that his duties in connection with that occupation were those of "supervising *only*." This representation was manifestly incorrect. He did not merely or only supervise the work on his oil lease; he did the work with his own hands. So that when he was asked what duties belonged to his occupation as an oil producer, he could not truly answer "supervising only." That the representation was material to the risk admits of no doubt. The hazard is manifestly different in the cases of two men engaged in the production of oil, the one in the capacity of a supervisor or overseer only, and the other as an actual operative in all branches of the work; at once the fireman, engineer, pumper, "well puller," and repairer of machinery. It was, therefore, clearly error for the court to submit to the jury, as it did, the question whether the representation mentioned was true or false. The evidence on

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the subject being undisputed and capable of but one construction, demonstrated that the representation was false in fact.

The question is presented on this motion, by two exceptions taken by the defendant; the one an exception to the denial of the defendant's motion for a nonsuit, made at the close of the evidence, on the ground that the undisputed evidence showed that the statement in the application was false, and, therefore, the certificate was void; the other an exception to the submission of the question to the jury. Both of these exceptions seem to have been well taken and, as well as the exception first considered, to furnish good ground for the motion for a new trial.

MACOMBER and CORLETT, JJ., concurred on the ground first stated.

Defendant's motion for a new trial granted, with costs to abide the event.

IN THE MATTER OF THE PROVING THE LAST WILL AND TESTAMENT
OF JAMES CONWAY, DECEASED.

Will — when subscribed and signed "at the end" thereof.

A testator wrote his will upon a half-sheet of legal cap paper, upon the first or front page of which was written the will down to and including the following words, in parenthesis, namely: "(Carried to back of will.)" Upon the top of the back of the sheet was written the word "(continued)." Following which were the remaining provisions of the will, to and including the words "signature on face of the will." All the rest of the will, including the appointment of the executor, the signature of the testator, the attestation clause, signed by the witnesses; and the signatures of the witnesses were filled in, in a printed blank, upon the lower part of the first page of the sheet of paper, following the words written thereon — "(carried to back of will)."

Held, that the will was subscribed by the testator, and signed by the witnesses "at the end of the will," in accordance with the provisions of the statute.

APPEAL by Bridget Dundon, Kate Kenedy and Elizabeth McMahon from a decree of the Surrogate's Court of the county of Wyoming, made and entered on the 16th day of November, 1889, admitting to probate an instrument propounded as the last will and testament of James Conway, deceased, and from each and every part thereof.

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M. E. & E. M. Bartlett, for the contestants, appellants.

G. W. Bottsford, Jr., for the proponent, respondent.

CORLETT, J.:

James Conway, who resided in Wyoming county, died on the 3d day of April, 1889, leaving a widow and six children, all of full age. Three of the children contested the will upon the ground that it was not properly executed. It came on for a hearing in Warsaw on the 8th of July, 1889, before the surrogate, Hon. BYRON HEALY. After hearing the evidence the surrogate made the following findings:

“That on the 14th day of April, 1886, James Conway, Sr., being a resident of the town of Genesee Falls, in the county of Wyoming and State of New York, at said town made, and subscribed at the end thereof, his last will and testament in writing; that said subscription was made by the said James Conway, the testator, in the presence of two attesting witnesses, each of whom signed his name at the end of said will, at the request of the said testator; that the said testator, at the time of making such subscription, declared the instrument so subscribed by him to be his last will and testament; that the said witnesses to said will wrote opposite to their names their respective places of residence; that it appears from the proofs of said will taken, that such will was duly executed (although in the form and manner hereinafter particularly stated), and that the testator at the time of executing the same understood its contents and was of sound mind and memory, and upwards of twenty-one years of age, and was in all respects competent to devise real estate, and not under any restraint. At the time the testator so subscribed said will, and when each of said attesting witnesses so signed his name at the end of the will at the request of said testator, and at the time said testator so declared said instrument to be his last will and testament, as aforesaid, and just before said testator subscribed said will as aforesaid, the said will was read over to said testator, and the testator believed the same read and was substantially as follows — and said will was and is in substance as follows, viz.:

“The last will and testament of James Conway, Sr., of the town of Genesee Falls, county of Wyoming and State of New York.

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"I, James Conway, aware of the uncertainty of life, do make, ordain, publish and declare this my last will and testament, in the manner and form following, that is to say :

"After the payment of my funeral charges, the expenses of administering my estate and my lawful debts, I give, devise and bequeath my property as follows :

"*First.* I will and bequeath to my wife, Elizabeth Conway, all my real and personal property during her natural life, and at her death to be divided as follows, viz. : To Jeremiah Conway, as the first heir, all that property east of the Erie R. Way, formerly known as the King property, containing 45 acres, known as the homestead.

"2. To Patrick Conway all that tract or parcel of land bounded as follows, viz. : On the east by Erie R. Way ; on west by public highway ; on the north, Henry Bigelow property and Anthony Davis property ; on south by W. P. Letchworth property, in all twenty-eight acres, more or less.

"3. To James Conway, Jr., the first homestead, containing twenty-seven acres, more or less. [*Carried to back of will.*]

"[*Continued.*] Moreover, all my personal property to be divided equally in three shares between the sons Jeremiah, Patrick and James, share and share alike. The wheat on Patrick's ground to be divided in three equal shares between them ; the use of all bonds equally used between them. Moreover, the timber on the property belonging to my son Jeremiah to be divided into three equal shares.

"To my daughter Bridget Dundon, now of Dale, Wyoming Co., N. Y., I bequeath the sum of twenty dollars (\$20).

"To my daughter Catherine Kenedy, now of Warsaw, Wyoming Co., N. Y., the sum of twenty dollars (\$20).

"To my daughter Elizabeth Conway, of Portageville, town of Genesee Falls, Wyoming Co., N. Y., the sum of four hundred dollars (\$400).

"The above amounts to be paid by my three sons in equal shares each. Also, I provide that the said amount, four hundred and forty dollars, be paid to the above-named parties eighteen months after the death of myself and wife.

"(Signature on face of the will.)

"Likewise I make, constitute and appoint Daniel L. Toland to be executor of my last will and testament, hereby revoking all former wills by me made.

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"In testimony whereof, I have hereunto subscribed my name and affixed my seal the fourteenth day of April, in the year of our Lord one thousand eight hundred and eighty 6.

"JAMES CONWAY. [L. s.]

"The above-written instrument was subscribed by the said James Conway in our presence, and acknowledged by him to each of us, and he at the same time declared the above instrument so subscribed to be his last will and testament; and we, at his request, have signed our names as witnesses hereto, in his presence, and in the presence of each other, and written opposite our names our respective places of residence.

"DANIEL L. TOLAND, *Portageville, N. Y., Wyoming Co., N. Y.*

"JOHN H. CARROLL, *Town Genesee Falls, Wyoming, N. Y.*"

In addition to the foregoing, I find the following facts, viz.:

That said will was and is written upon one-half sheet of paper of the ordinary size of legal cap paper.

That all of said will, from the beginning of it down to and including these words in brackets, viz., "[*Carried to back of will*]," where they occur in said will, as hereinbefore set forth, was written on and is upon the first or front page and side of said half sheet of paper.

That the word "[*continued*]" immediately following in said will these words in brackets, "[*Carried to back of will*]," where they occur in said will, as hereinbefore set forth, down to and including these words in quotation marks in said will, viz., "Signature on face of the will," is written on and is upon the back side and second page of said half sheet of paper.

That all the rest, residue and remainder of said will, including the appointment of the executor, the signature of the testator, the attestation clause signed by the witnesses, and the signatures of the witnesses, is written, and is immediately after these words, "Signature on face of the will," and was written on, and is upon the first page of said half sheet of paper, and on the front side of said half sheet.

That after the testator executed and subscribed said will, and after the witnesses signed said will and the testator published and declared it as aforesaid, the testator died.

From the foregoing, I find that the said will was duly executed in all respects so as to pass real and personal property, and that the same is duly proved and entitled to be admitted to probate as a will valid to pass real and personal property."

There is no substantial controversy as to the findings being warranted by the proofs. The appellant's contention is that the will was not subscribed at the end thereof.

Section 40 of article 3 of chapter 6, part 2, Revised Statutes ([8th ed.] vol. 4, p. 2547), provides: "First. It shall be subscribed by the testator at the end of the will. * * * Fourth. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator."

The learned counsel for the appellant cites, in support of his position, *Matter of Probate of Will of Hewitt* (91 N. Y., 261). The judge delivering the opinion says, at page 264: "Here the signatures of the witnesses are followed by an important provision of the will, disposing of property to his brother. They are not written at the end of the will, but manifestly near the middle thereof, and hence, plainly from an inspection of the will, the statute was not complied with."

He also cites *Matter of the Will of O'Neil* (91 N. Y., 516), where the instrument was manifestly not signed at the end of the will.

An inspection of this will, a copy of which accompanies the appeal papers, shows that it was written on both sides of a half sheet blank. The form of the blank assumes there was room on the first page to write the whole will, for printed forms for the signatures and attestation appear at the foot of the page, and the other side of the half sheet before written upon was entirely blank. There is a clause at the end of the written matter on the first page stating in brackets, "Carried to back of the will." On the back of the will the word "Continued" appeared, after which all of the balance of the disposing part of the will was written. Then comes the signature and attestation.

It is obvious that the writing on the back part of the half sheet was because of want of room on the first side and a mere continuance, and the person drafting the will takes pains, in substance, so to state. The signature and attestation clause are where they would and ought to have been if there had been room enough to write the will on

the first side. Whereas the will on its face shows that the writing was continued on the other half, then subscribed and witnessed. No reason is seen why this is not a signing and subscribing at the end of the will.

The findings of the learned surrogate are clearly warranted by the testimony. A substantial compliance is all the statute requires. (*Jackson v. Jackson*, 39 N. Y., 153; *Tonnele v. Hall*, 4 Comst., 140; *Hitchcock v. Thompson*, 6 Hun, 279; *Kelly's Case*, 67 N. Y., 416.) There are numerous other cases to the same effect. The authorities cited by the learned counsel for the appellants do not conflict with the above cases.

The conclusion of the surrogate was right, and the decree must be affirmed.

DWIGHT, P. J., and MACOMBER, J., concurred.

Decree of surrogate of Wyoming county affirmed, with costs to the respondent payable out of the estate.

CLEON STONE, BY GUARDIAN, RESPONDENT, v. THE TOWN
OF POLAND, APPELLANT.

Negligence—town highway out of repair—acts and declarations of the highway commissioners subsequent to the accident, how far evidence against the town—evidence as to the subsequent repair of the highway.

In an action brought against a town to recover the damages alleged to have been sustained by the plaintiff through the negligence of the commissioner of highways thereof, evidence as to the statements made by the commissioner, on the day following the accident, that he supposed the road had been repaired, and that he had ordered a man to make such repairs at two different times, is incompetent. (CORLETT, J., dissenting.)

While the act, declaration or omission of duty of a party to a suit, whether before or after the event, may be given in evidence against him, yet where liability against a town is sought to be established by reason of the negligent omission of the commissioner of highways thereof, the declarations of the latter, when made after the injuries have been received, are not competent evidence.

While, in such an action, evidence of repairs having been made shortly after the accident may not be competent, if offered for the purpose of showing that the party charged with negligence must have known before the accident of the dan-

gerous character of the locality, yet such rule does not prevent a witness from describing the condition of the place where the accident has happened, although it may incidentally and argumentatively involve the fact that the party charged with maintaining the road has, since the accident, made repairs thereon; and evidence of the condition of the highway, from a witness inspecting it after the accident, may be proper to show the presence of funds in the hands of the highway commissioners at the time of the accident.

APPEAL by the defendant, the Town of Poland, from a judgment, entered in the above-entitled action in the Chautauqua county clerk's office on the 24th day of September, 1889; and also from an order, made at the Chautauqua County Special Term on the 12th day of May, 1890, denying the defendant's motion, made on a case containing exceptions, for a new trial.

The action was brought to recover damages alleged to have resulted to the plaintiff from injuries received upon a public highway, in the town of Poland, by reason of a certain bridge, and the approaches thereto, having been, as was alleged, out of repair and in a dangerous and unsafe condition.

It was tried at the Chautauqua County Circuit, at which a verdict was rendered in favor of the plaintiff for the sum of \$1,000.

F. W. Stevens, for the appellant.

A. C. Wade, for the respondent.

MACOMBER, J. :

The verdict was rendered upon a complaint demanding damages alleged to have been sustained by the plaintiff through the negligence of the commissioner of highways of the town of Poland, by which the plaintiff on the 22d day of May, 1887, received personal injuries. After passing the bridge over Conewango river, the horse then driven by the plaintiff, either through fright at the new structure erected near the highway, or by accidentally stepping into a hole in the highway, caused the plaintiff to be thrown down an embankment.

The main question in the case was whether the commissioner of highways had omitted any duty which he owed to the traveling public in failing to make the place in question safe for travelers. It is quite evident that the verdict could not have been based upon the fact that the defect in the highway had continued so long as to

charge the commissioner with negligence in failing to discover its existence. The negligence of the defendant was established, if at all, by the evidence of three witnesses, who testified, under objection and exception by the defendant's counsel, that the commissioner said, on the day following the accident, that he supposed the road had been repaired, and that he had ordered a man to make such repairs at different times. The exception to this evidence presents the main ground upon which the appellant's counsel asks for a reversal of the judgment.

Chapter 700 of the Laws of 1881, making towns responsible for injuries where theretofore the commissioner of highways alone was held liable, has introduced no new rule of evidence. The admissions of a person not a party to the action are, in this class of cases as in all others, inadmissible because they are mere declarations of persons not parties to the action, and afford no reliable evidence upon which courts can safely pronounce judgment. It is only when the act or declaration of a person forms part of a transaction, and is a fact in issue, that such act or declaration is competent to be given in evidence, and then only in order to show the purpose or character of the transaction or to explain its meaning. In the case before us the liability of the defendant depends upon the performance or the non-performance of the duty of a third person, namely, the commissioner of highways. His act, declaration or omission of duty is competent in an action against the town only when the act, declaration or omission of duty occurred in the course of his business in respect of his duties as such highway commissioner. Had he stated to either of these three witnesses, before the time of the accident, that he had required a subordinate to repair the defect in the highway, there would have been presented conclusive evidence of his actual knowledge of the dangerous condition of the highway and of the necessity of repairs. That would be a fact germane to the case, but his unsworn declaration that he had given such directions, made after the accident, is not any evidence of such knowledge.

The general rule undoubtedly is that the act, declaration or omission of duty of a party to a suit, whether given before or after the event, may be given in evidence against him. But where liability against a town is sought to be established by reason of the negligent omission of the commissioner of highways, the declarations of the

latter are not competent evidence when made after the injuries have been received by the plaintiff. As was said in the case of *Stephens v. Vroman* (16 N. Y., 383, 384.) "The law does not regard as sufficiently authentic to influence a jury any statement which is not made under the sanction of an oath, and, in general, it further requires that the witness making the statement should be present at the trial, to the end that he may be examined by the adverse party, and that the jury may draw their own conclusions as to his sincerity and accuracy, by his appearance and bearing upon the witnesses' stand. This rule does not, however, embrace the admissions of a party to the action, for, upon equally plain principles, anything which a man says against himself may be given in evidence by his adversary, as it is not to be supposed that one will make a statement adverse to his own interests unless it is true."

These declarations were but a narrative of a past transaction and were not admissible. In the case of *Waldele v. The New York Central and Hudson River Railroad Company* (95 N. Y., 274) the plaintiff's intestate was struck by an engine while crossing the defendant's tracks and received injuries from which he subsequently died. Half an hour after the accident his declarations, made by the sign-language, he being a deaf mute, were given in evidence to the effect that there was a long train passing the tracks; that he waited for it to go by, and after it had passed, attempted to cross and was struck by an engine which followed. It was held, after a thorough review of the authorities, that this was but a declaration of a past transaction and was incompetent; and the judgment, partially based upon such evidence, was reversed. (See, also, the cases of *The People v. Beach*, 87 N. Y., 508; *Whitaker v. Eighth Ave. R. R. Co.*, 51 id., 295; *People v. Davis*, 56 id., 95; *Tilson v. Terwilliger*, Id., 273.) For this reason the judgment and order appealed from should be reversed, and a new trial granted.

A further point is made by counsel for the appellant that evidence of repairs being made shortly after the accident was not competent under the decision of the case of *Corcoran v. The Village of Peekskill* (108 N. Y., 151). The last-cited case holds that evidence, if offered for the purpose of showing that the party charged with negligence must have known before the accident of the dangerous character of the locality, was incompetent; yet we do not understand that case

to lay down any rule which prevents a witness from describing the condition of the place where an accident has happened, even though it does incidentally and argumentatively involve the fact that the party charged with maintaining it has, by making repairs thereon, by so much, confessed to his dereliction, provided the evidence is material for some purpose which is legitimate. If we understand the rulings of the learned trial justice aright, he recognized the rule laid down in the case cited above, and admitted the evidence of the condition of the highway from the witness inspecting it after the accident, to show the presence of funds in the hands of the highway commissioner at the time of the accident. For this purpose the evidence, though perhaps unnecessary, was competent. (*Getty v. Town of Hamlin*, 28 N. Y. St. Rep., 275.)

Judgment and order must be reversed and a new trial granted, with costs to abide the event.

DWIGHT, P. J., concurred.

CORLETT, J. (dissenting):

On the 22d day of May, 1887, the plaintiff while attempting to cross a bridge over Conewango river, between Poland Center and Mud Creek, in the town of Poland, county of Chautauqua, was thrown down an embankment constructed at the northerly approach to the bridge, and in the fall he received personal injuries, to recover damages for which he brought this action, which was tried on the 14th day of May, 1888, before Justice HAIGHT and a jury. It resulted in a verdict for the plaintiff of \$1,000. A motion for a new trial was denied, and the defendant appealed to this court.

The approach to the bridge was constructed by placing logs and chunks against the piles, extending it back from the stream to the bank, in this manner building up an embankment ten or eleven feet high next the bridge, covered with earth and gravel. The embankment at the end of the bridge was about eleven and one-half feet high, growing less as the bridge was left. On each side of this embankment there was a perpendicular descent from the road-bed of eleven and one-half feet at the end of the bridge, and four or five feet from that point the descent was ten feet. The floor of the

bridge was twelve feet in width, which continued until the approach proper was reached, and then the way was narrowed to about ten feet. There were no barriers on either side of the embankment and it was claimed, on the part of the plaintiff, that there was a hole in the approach at the northerly side of the bridge, near the easterly side of the road, which narrowed it to about eight feet.

It was also claimed that this hole had existed a month prior to the accident, and had gradually grown in size until it was two feet in diameter. At the time of the accident the plaintiff was passing over the bridge from the south, and it is claimed that his horse shied and stepped into this hole, stumbled and fell over the embankment, carrying with him the carriage and the plaintiff. There is no controversy on this appeal as to the plaintiff's right to recover unless errors were committed in the admission of evidence on the trial.

Orrin J. Tracy was sworn as a witness, and testified that the morning after the accident he went to the bridge and measured it. He also stated the situation as it appeared at that time. No objection was taken to this evidence. George W. Jones was also sworn as a witness for the plaintiff, and testified that on the 17th day of April, 1888, he examined, with others, the northerly end of the approach, and describes it. He was then asked: "In what condition was the bridge at that time?" This was objected to by defendant's counsel "*as immaterial.*" The plaintiff's counsel said: "I simply want to show its condition when he made the examination." The court stated: "You were not seeking to show that there has been anything done since," to which the plaintiff's counsel assented. The evidence was received, and the defendant's counsel excepted. It is obvious that this evidence was not offered or received for the purpose of showing that repairs had been made after the accident to establish negligence. It was not so regarded by the defendant's counsel, as it was simply objected to as immaterial, but the court took pains to indicate that the evidence was not admitted to show subsequent repairs for the purpose of establishing negligence.

The doctrine of *Corcoran v. Village of Peekskill* (108 N. Y., 151) has no application. No error was committed in the admission of this evidence. Its purpose was simply to throw light upon the condition of the hole and its surroundings at the time of the accident.

Walter B. Wait, a witness for the plaintiff, testified that he saw the highway commissioner the next day after the accident and talked with him about it. He was then asked: "What did you hear him say about the road at that time?" "This question was objected to by the defendant's counsel, on the ground that the commissioner's admissions were not binding upon the defendant." The objection was overruled and exception taken.

The witness then stated, he supposed the road was repaired; that he had ordered Campbell to do it two different times. Other evidence was given to the same effect, under like objection and exception. The admission of those declarations is urged as error by the learned counsel for the appellant.

Chapter 700, section 1 of the Laws of 1881, provides: "The several towns in this State shall be liable to any person suffering the same, for all damages to person or property by reason of defective highways or bridges in such town, in cases in which the commissioner or commissioners of said towns are now by law liable therefor, instead of said commissioner or commissioners of highways."

Commissioners of highways are public officers who have entire charge of the construction and repair of highways, and are in no sense agents of the town. (*Bidwell v. Town of Murray*, 40 Hun, 191-193.)

The statute does not change the relation of the town to the highways or the commissioners, so far as it relates to supervision or repairs. Those obligations still rest upon the commissioners as such, and not as agent of the town. The liability which this act imposes upon the town, confers upon it no control or supervision of the highways.

The learned counsel for the appellant concedes that declarations or statements of the commissioner before the accident would have been admissible. It is a familiar rule that admissions or declarations of an agent are not admissible, no matter when made, to bind the principal, unless they are a part of the *res gestæ*. (*Thalhimer v. Brinckerhoof*, 4 Wend., 394-397; *Dean v. Aetna Life Ins. Co.*, 62 N. Y., 642.)

So that declarations made before the accident are no more admissible, unless part of the *res gestæ*, than those afterwards. In

Bidwell v. Town of Murray, above cited, evidence was admitted on the trial of the declarations of the commissioner the summer before the accident. The learned justice, delivering the opinion on appeal, speaking on this point, says, at page 196: "There was no error in receiving the evidence of the declaration of the commissioner, made the summer before the accident, to the effect that he had got to go and repair this bridge. This evidence was competent only as bearing on the question of his knowledge of the condition of the bridge, and not to show that it was defective, and it was received only for such limited and legitimate purpose."

It is clear from this quotation that those declarations were not made while the commissioner was doing any act in an official capacity, or as a part of the *res gestæ*. The statement was simply to the effect that he must thereafter go and repair the bridge. These admissions were received to show the knowledge of the commissioner. The personal knowledge of an individual may ordinarily be proved by his acts or declarations. Whether these acts or declarations were before or after the accident must be entirely immaterial. The declarations in the case at bar were admissible simply as evidence, tending to show previous knowledge by the commissioner of the existence of the hole which caused the accident.

The learned counsel for the appellant is entirely right in his general position that declarations or statements of persons not parties to the action are inadmissible to bind those who are. But where the material question depends upon the personal knowledge of the individual, in the nature of things, his acts or declarations must be evidence on that subject, and the time when made is entirely immaterial. The declarations in this case were received simply to show the knowledge of the commissioner, and the trial court fell into no error in receiving them for that purpose.

The statement that the highway commissioner's declarations were not admissible to bind the town in the manner made is misleading. No general rule is more familiar than the one forbidding declarations of competent witnesses from being evidence against either party to the action. But where declarations are, in their very nature, competent to prove a fact, they are not rendered inadmissible because they are not made by the parties to the action.

The fact that the town is alone liable to be sued for an injury

caused by a defective highway or bridge in no way changes the proof upon which a recovery depends. The duties of highway commissioners continue the same as to supervision and repairs; but for the purpose of avoiding circuitry and compelling direct payment the statute transfers the right of action against the town.

It is conceded that the proof to charge the town must establish the same facts as if brought against the commissioner. But the learned counsel for the appellant contends that while, as against the commissioner, his declarations on the question of knowledge, either before or after the accident, would be admissible, they are not so against the town. It is not necessary to determine whether, for certain purposes, the commissioner must be called to prove facts which could formerly be shown by his declarations; such as whether the highway or bridge was defective or out of repair. No such question is presented. The point here is, whether a certain fact, which may be an important element to prove negligence, can be proved in a particular way. That fact in the case at bar is the commissioner's knowledge.

The knowledge of an individual may be shown in certain cases by his opportunities to know; it may also be shown by his acts or declarations. In the case at bar it is agreed that if the declarations had been made before the accident, that would have furnished evidence of knowledge. No criticism is made upon the decision in *Bidwell v. Town of Murray* on this question. In fact, the learned counsel for the appellant admits that if the declarations had been made before the accident, they would have been admissible on that question.

The fact that admissions are generally inadmissible is not questioned by either party. It never was the rule that the time when declarations are made was important in determining the question of their admissibility. It never can be proved, except as part of the *res gestæ*, for the simple reason that declarations *per se* are generally inadmissible to bind third persons. But where a thing evidenced by the declarations is confined to the knowledge of the person making them, then a different question is presented. If a person, before the accident, when he is doing no act required either by agency or official business, makes a declaration, it is not admissible except as showing personal knowledge. If he makes the same

declaration after the accident, no reason is perceived why it is not just as admissible for the same purpose. It is not a part of the *res gestæ* in either case. As to whether he would be most likely to make a false declaration, before or after the accident, as to his personal knowledge, must, in the nature of things, depend upon circumstances and conclusions affecting credibility. But how the time when made controls its admissibility is not seen.

Bidwell v. Town of Murray is decisive upon this question. If the court was right in that case, it follows that the evidence was admissible in this to prove the same fact.

The judgment and order should be affirmed.

Judgment and order appealed from reversed and a new trial granted, with costs to abide the event.

JAMES FRASER AND WILLIAM H. WALKER, EXECUTORS,
ETC., OF JOHN McNAUGHTON, DECEASED, RESPONDENTS
AND APPELLANTS, v. MARGARET McNAUGHTON AND
OTHERS, RESPONDENTS, THE TRUSTEES OF THE GEN-
ERAL ASSEMBLY OF THE UNITED PRESBYTERIAN
CHURCH OF NORTH AMERICA, APPELLANT.

Will — equitable conversion of real estate into personalty.

A testator, by his will, provided as follows: "I do hereby authorize and empower my executors, or a majority of them, as soon as convenient after the death of my wife, to sell and dispose of my real and personal estate of which I may die seized, on such terms as to the said executors, or a majority of them, shall seem just and proper, within three years after my wife's death." And further provided: "I hereby authorize and empower my executors, or a majority of them, as soon as convenient after my decease, to sell and dispose of my real estate of which I may die seized, on such terms as to the executors, or a majority of them, shall seem just and proper, within three years from my death; and until said real estate is sold I hereby authorize my executors to take charge and supervision over it and the avails of the said real estate, together with such balance as shall remain of my personal property after all debts, charges, funeral expenses and legacies are paid off as provided for, together with all expenses and charges of executing this will "

In an action brought to obtain a construction of the will it was claimed by a beneficiary named therein that, under the aforesaid provision of the will, upon

the principal of equitable conversion, the real estate of the testator must be deemed to have been converted into personal property.

Held, that as it was no where made the duty of the executors to sell the real estate, and as it did not appear that the testator intended that the same should be sold by them in any event, that the doctrine of equitable conversion was not applicable.

APPEAL by the plaintiffs from an order made at a Special Term held in the county of Monroe on the 1st day of August, 1888, and entered in the office of the clerk of the county of Livingston, August 3, 1888, and from so much of said order as awards to the defendant, the Trustees of the General Assembly of the United Presbyterian Church of North America, an allowance of the sum of \$350, to the infant defendants George Halsted Bristol and Larius Fillmore Bristol, Jr., an allowance of the sum of \$350, and to the defendants Margaret McNaughton and others an allowance of the sum of \$300.

APPEAL by the defendant, the Trustees of the General Assembly of the United Presbyterian Church of North America from a judgment of the Supreme Court, entered in the office of the clerk of the county of Livingston on the 3d day of May, 1889, construing the will of John McNaughton, deceased, and from the whole of said judgment, and from such parts thereof as adjudged and decided that under said will there is no equitable conversion of the real estate of said decedent into personal, and that the bequest and devise in said will to said defendant is void, and that the portions of the real estate of said John McNaughton, mentioned in items 10, 11 and 12 of his said will, are not disposed of by said will, but descend to his heirs-at-law, with notice of an intention to bring up for review, upon said appeal, so much of the order, entered in the Livingston county clerk's office on the 3d day of August, 1888, as awards an extra allowance of costs to the plaintiff.

J. W. Taylor, for the Trustees, etc., of the United Presbyterian Church, etc., appellant.

L. N. Bangs, for the executors, respondents and appellants.

P. M. French, guardian *ad litem* of the infant defendants.

MACOMBER, J. :

This action is brought to obtain a construction of the will of John McNaughton, deceased, which bears date February 26, 1880, and which was admitted to probate July 9, 1881. The only survivors of the testator are his two grandchildren, the infant defendants, George Halsted Bristol and Larius Filmore Bristol, and Margaret McNaughton the widow of the deceased. The appellant upon the principal question the Trustees of the General Assembly of the United Presbyterian Church of North America, is a corporation organized under the laws of Pennsylvania, and is a benevolent, charitable and religious missionary society, within the meaning of chapter 360 of the Laws of 1860 of New York, and is not authorized to take real estate by devise by the laws of this State. Its counsel attempts to procure an adjudication on this appeal to the effect that, under the principle of equitable conversion, the real estate of the testator must be deemed to have been converted into personal property, and that, consequently, the appellant can receive the share so given to it by the will, which is three-fourths of the residuary part of the estate. If the principle of equitable conversion can be applied to this case, the appellant would be entitled to receive the share for which it contends, otherwise not.

The question is to be determined by the third and eighth clauses of the will, which are as follows: "Item 3d. I do hereby authorize and empower my executors, or a majority of them, as soon as convenient after the death of my wife, to sell and dispose of my real and personal estate of which I may die seized, on such terms as to the said executors or a majority of them shall seem just and proper, within three years after my wife's death. * * * Item 8th. I hereby authorize and empower my executors, or a majority of them, as soon as convenient after my decease, to sell and dispose of my real estate of which I may die seized, on such terms as to the executors, or a majority of them, shall seem just and proper, within three years from my death, and until said real estate is sold I hereby authorize my executors to take charge and supervision over it and the avails of the said real estate, together with such balance as shall remain of my personal property after all debts, charges, funeral expenses and legacies are paid off, as provided for, together with all expenses and charges of executing this will."

The pervading difficulty in applying the doctrine of equitable conversion to these clauses of the will consists in the fact that it is nowhere made the duty of the executors or trustees to sell the real estate; nor does it appear that the testator intended that the same should be sold by them in any event. In the absence of such a direction and in the absence of such a positive intent this doctrine cannot be applied. (*Scholle v. Scholle*, 113 N. Y., 270; *Hobson v. Hale*, 95 id., 597; *White v. Howard*, 46 id., 162; *Newell v. Nichols*, 12 Hun, 624; *Gourley v. Campbell*, 66 N. Y., 173; *Wright v. Trustees M. E. Church*, Hoff. Ch., 202.)

As it is said in *Scholle v. Scholle* (*supra*): "There is in the will no imperative direction for the sale of the real estate. Indeed, there is no direction to sell at all. A power or authority to sell is given, but unless the exercise of that power is rendered necessary and essential by the scope of the will and its declared purposes, the authority is to be deemed discretionary, to be exercised or not as the judgment of the executrix may dictate, and so an equitable conversion will not be decreed. To justify such a conversion there must be a positive direction to convert, which, though not expressed, may be implied; but, in the latter case, only when the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt. Where, however, only a power of sale is given without explicit and imperative direction for its exercise, and the intention of the testator in the disposition of his estate can be carried out, although no conversion is adjudged, the land will pass as such and not be changed into personalty." (See, also, *Chamberlain v. Taylor*, 105 N. Y., 194.)

This is the only question raised by the appeal upon the merits of the case, and we are of the opinion that the learned trial justice was correct in his conclusion that items ten, eleven and twelve of the will, by which there was given to the General Assembly of the United Presbyterian Church of North America three-fourths of the residue of the estate, after the payment of certain debts and legacies, were inoperative, and that the property therein mentioned descends to the heirs-at-law of the testator.

There is also an appeal from the order of the court granting certain additional allowances of costs to the various litigants. The

plaintiffs appeal from the allowance to the defendants, and the defendant, The Trustees, etc., appeal from the allowance made to the plaintiffs. The sum of \$800 in all was granted to the several parties. Undoubtedly, the case may be deemed to be difficult and extraordinary within section 3253 of the Code of Civil Procedure, but the allowance thereunder must be limited to the percentage of five per cent upon the value of the subject-matter involved in the litigation.

In the absence of a finding by the court of the value of the real estate left by the testator to the appellant, The Trustees, etc., of the Presbyterian Church, etc., resort must be had upon this question to the affidavits and other evidence in the case, from which it appears that the whole of the estate left by the testator, both real and personal, was \$16,700. There was an incumbrance upon the real estate of \$2,600. The personal estate, consisting of \$3,700, was exhausted in payments of the debts. The specific legacies under the fourth, fifth and sixth items of the will amounted to \$1,600. The life estate of Margaret McNaughton was \$2,900, leaving a residue of the estate for distribution under the residuary clauses of the will of \$5,900. One-fourth of this sum is payable to the American Bible Society, leaving the sum of \$4,425, the amount of the gifts to the defendant corporation, as the sole matter in controversy. The allowance to the respective parties must be graduated accordingly. (*Struthers v. Pearce*, 51 N. Y., 365; *Conaughty v. Saratoga Co. Bank*, 92 id., 401; *Moore v. Appleby*, 108 id., 237.)

The judgment appealed from should be affirmed, with costs of the appeal to the infant defendants, and the order appealed from should be modified by limiting the additional allowances of costs to the sum of \$221.25, being five per cent of the subject-matter involved, to be distributed in the same relative proportion as under the order of the Special Term.

DWIGHT, P. J., and CORLETT, J., concurred.

Judgment appealed from affirmed, with costs. Order appealed from modified, as stated in opinion, without costs to either party.

CHARLES E. TUTTLE, APPELLANT, v. THOMAS DENNIS,
RESPONDENT, IMPLEADED WITH TRUMAN PARSHALL.

Lien for service by a stallion — upon a mare and colt in the hands of one purchasing the mare before the filing of a notice of the lien.

In an action brought to foreclose a lien for twenty-five dollars, which the plaintiff claimed for service of his stallion rendered to the mare of the defendant, it appeared that a written statement had been filed in the proper clerk's office, under the provisions of chapter 458 of the Laws of 1887, as amended by chapter 457 of the Laws of 1888, and that a certificate or license had been issued by the county clerk to the owner of the stallion, and that a notice of lien had been filed and recorded, as required by section 3 of said act, in the clerk's office, before the expiration of six months from the date of service; but that the mare had been purchased by the defendant in the action after such service, and before any notice of lien was filed.

Held, that a lien was created, *in præsenti*, from the time of service, which could only be defeated by the failure of the owner of the stallion to file a notice of the lien within the time prescribed by the statute.

APPEAL by the plaintiff Charles E. Tuttle from a judgment of the Ontario County Court, entered in the clerk's office of the county of Ontario on the 7th day of May, 1890, in favor of the defendant and against the plaintiff, for forty dollars and twenty-eight cents, reversing the judgment of a justice of the peace in favor of the plaintiff.

The action was brought to foreclose a lien, upon a mare and colt, by the plaintiff, as the owner of a stallion, under the provisions of chapter 458 of the Laws of 1887, as amended by chapter 457 of the Laws of 1888.

The lien claimed was for twenty-five dollars for service by the stallion, and the proceedings were instituted before a justice of the peace. Both defendants appeared, but the defendant Thomas Dennis alone answered the complaint. The justice, on the 18th day of December, 1889, rendered judgment establishing the plaintiff's lien upon the mare and colt in question, which judgment was reversed by the County Court.

E. W. Gardner, for the appellant.

Charles H. Paddock, for the respondent.

MACOMBER, J. :

This action was begun before a justice of the peace to foreclose a lien of twenty-five dollars, which the plaintiff claimed for services of his stallion rendered to the mare of the defendant Parshall. The price agreed upon with the defendant Parshall, who then owned the mare, was twenty-five dollars to insure. The defendant Dennis bought the mare after such service and before any notice of lien was filed.

The judgment of the justice of the peace was as follows: "I find from the evidence that the plaintiff has a lien on the mare and colt in the sum of twenty-five dollars, and that he is entitled to foreclose his lien and sell said property. Wherefore I did, on December 18, 1889, render judgment in favor of the plaintiff and against the defendant for \$25 damages and \$6.78 costs."

This action was brought in pursuance of the provisions of chapter 458 of the Laws of 1887, as amended by chapter 457 of the Laws of 1888, entitled "An act to prevent deception and fraud by owner or owners, or agent, who may have control of any stallion kept for service, by proclaiming or publishing fraudulent or false pedigrees, and to protect such owner or owners or agents in the collection of fees for the services of such stallions."

By section 1 of this act provision is made for filing with the clerk of the county a written statement giving the name, age and pedigree, if known, the description and terms and conditions upon which the stallion will serve. Upon filing such statement the county clerk is required to issue a certificate or license to the owner that such statement has been filed in his office, which statement and certificate shall be posted in a conspicuous place in each locality in which the stallion shall be kept for service. Section 2 provides a penalty for publishing a false pedigree of the horse. Section 3 is as follows: "Whenever the owner or agent of any stallion shall have complied with the foregoing provisions of this act, the services of such stallion shall become a lien on each mare served, together with the foal of such mare from such service, in an amount agreed upon between the parties at the time of service, or if no agreement was entered into then in such amount as specified in the statement of the owner or agent filed with the county clerk, provided a notice of lien shall be filed, within one year after such service, in the same manner and

place as chattel mortgages are now required by law to be filed. The notice of lien so filed shall be in writing, specifying against whom the claim is, the amount of the same, together with a full description of the property upon which the lien is held. Such lien shall terminate at the end of one year from the date of filing notice thereof, unless within that time an action shall be commenced for the enforcement thereof."

The amendment made by chapter 457 of the Laws of 1888 extended the time for filing the notice of lien from six months, as was provided in the act of 1887, to one year from the time of service. No question is made but that the plaintiff conformed strictly to the requirements of this act relating to the duties of the owner of stallions. A proper certificate was issued to him by the county clerk and the same was duly posted. A notice of lien, as required by section 3, was filed in the clerk's office on December 8, 1888, before the expiration of six months allowed by the statute of 1887, from the time of service, and the same was duly filed and recorded.

The learned county judge reversed the judgment of the justice of the peace upon the ground that the defendant Dennis, having purchased the mare before notice of lien had been filed, took her and her subsequent foal discharged of any lien in favor of the plaintiff by this statute. That proposition presents the only meritorious question in the case.

This act, manifestly, was passed in the interest of the improvement in the breed of horses through systematic and judicious breeding, and for the protection and encouragement of the owners of stallions with ancient pedigrees against persons fraudulently seeking service without pay. Very little reflected light is thrown upon its interpretation from the mechanics' lien laws of the State; yet, in so far as such laws may be resorted to for its elucidation, the same corroborate the contention made in behalf of the plaintiff, namely, that it is not necessary to charge the purchaser of the mare with notice of the service in order to enable the owner of the stallion to enforce this statutory lien. The mechanics' lien law of 1875, chapter 233, provided that any person who should thereafter perform any labor in erecting, altering or repairing any house, building, etc., with the consent of the owner, being such owner as is in this section hereinafter described, should, on filing with the

county clerk of the county in which the property is situated, the notice prescribed by the fourth section of this act, have a lien for the value of such labor and materials upon such house, etc., to the extent of the right, title and interest of the owner of the property, existing at the time of filing said notice. Section 4 of that act provided that no lien should attach to said land, buildings or appurtenances unless such notice was filed by the clerk; and such notice when so filed thereafter only operated as an incumbrance upon said property. By the lien law applicable to the city of New York, chapter 379 of the Laws of 1875, it was expressly provided that no lien should attach until the filing of the claim. So, also, of the lien law given to livery stable keepers and others (chapter 498 of the Laws of 1872), where the lien was expressly declared to take effect only from the time of giving the notice thereof, and while the property was in the hands of the keeper, etc. Under these laws, and, as we understand it, under all mechanics lien laws, no lien can be created until notice thereof is actually filed.

In the act before us for construction, certain duties are required of the owner of a stallion as a condition precedent to any right of lien. He is required to file a statement of the pedigree of his horse, and if the same is untrue, no recovery can be had for service. There is nothing analogous to this requirement in the mechanics' lien laws. The purpose of the statute seems to be, that when the owner has fully and fairly disclosed the pedigree of his stallion, and has filed the same with the clerk of the county, and has received and posted the same together with the clerk's certificate, he shall not be cheated or deprived of the value of the service. The statute makes it a condition precedent to the lien that the statement of such pedigree shall be filed and posted. It is absolute in its terms, that in such an event the owner shall have a lien. Its language is: "Whenever the owner or agent of any stallion shall have complied with the foregoing provisions of this act, the service of such stallion shall become a lien on each mare served, together with the foal of such mare, from such services," etc. Here a lien was created *in præsentia* from the time of service. There was provided but one way of defeating it, and that consisted in the failure of the owner of the stallion to file a notice of lien within the time prescribed by the statute. The lien existed from the time of service, but it was liable to

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become inoperative and defeated by a failure to file the notice, and in no other event. This, manifestly, was the purpose of the statute. In the usual course of service, where, as in this case, the contract was to insure, it could not reasonably be expected that the owner would, immediately after the service, file a notice of lien. Such act was not required in order to secure him.

A very significant circumstance in determining the intent of the legislature in this respect is the fact that, in the act of 1887, the time for filing the notice of lien was limited to six months, but experience showed that in many, perhaps in a majority of cases, it was not absolutely determinable whether the mare was in foal at the end of six months from the service, and hence the time was extended to one year for the filing of the notice, a period in which it would be absolutely known whether or not the contract to insure had been fulfilled. Under this act we are of the opinion that the purchaser of the mare takes the property, subject to the lien which may then exist upon her and her foal.

The judgment of the justice of the peace, though not artistically prepared, is, in substance, in accordance with sections 1737 and 1740 of the Code of Civil Procedure. Even if it were otherwise, it was the duty of the County Court, under section 3063 of that Code to render the proper judgment according to the justice of the case, without regard to technical errors or defects which did not affect the merits of the case.

We are not unmindful that there is a further question in the case relating to notice to the defendant Dennis, before purchasing the mare, of the actual services rendered by the plaintiff's stallion; but we prefer to rest our judgment upon the main proposition as contained above, namely, that the lien for the service of a stallion under this statute attaches from the time of service, provided the same is followed by the filing of the notice of such lien within the time prescribed.

The judgment of the County Court should be reversed and that of the justice affirmed, with costs.

DWIGHT, P. J., and CORLETT, J., concurred.

Judgment of the County Court of Ontario county reversed and that of the justice of the peace affirmed, with costs of this appeal and in the County Court.

**THERESA WIWIROWSKI, AS ADMINISTRATRIX, ETC., RESPOND-
ENT, v. THE LAKE SHORE AND MICHIGAN SOUTHERN
RAILWAY COMPANY, APPELLANT.**

Proof as to the absence of contributory negligence—from what facts the taking of proper precautions may be presumed.

In an action brought by a wife to recover the damages resulting from the death of her husband upon the defendant's railroad, it appeared that the wife, her husband and a friend, were walking on a sidewalk, across which ran the tracks of the railroad company, the wife being about three feet behind her husband and his friend; that the plaintiff, as they approached the tracks, watched for a train passing up or down; that she looked both ways, saw no light or car coming, heard no noise, saw no flagman, heard no one call to them, and did not hear any bell or whistle; that the two men stepped upon the tracks of the defendant's railroad and were struck by the rear end of a tender attached to a locomotive which was being backed along the track, and were both killed.

The evidence offered by the defendant, the Railroad Company, tended to show that proper signals were given as the engine and tender approached the crossing; that the persons killed were trespassing upon the defendant's tracks, and that they were warned and urged not to cross by the flagman, but his warnings were unheeded, while the evidence on the part of the plaintiff tended to show the reverse.

At the close of the evidence the defendant's counsel asked the court to direct a verdict for the defendant upon the ground, among others, that there was no proof of want of contributory negligence on the part of the deceased.

Held, that the motion was properly denied; that if the jury found, as they might, that the plaintiff's evidence was true, they might fairly assume that her husband took the same precautions as the plaintiff, and made the same observations as she did. (DWIGHT, P. J., dissenting.)

APPEAL by the defendant from a judgment, entered in the office of the clerk of the county of Erie on the 20th day of February, 1890, in favor of the above-named plaintiff and against the said defendant, for the sum of \$2,600.47, damages and costs; and also from an order, entered in said clerk's office on the 11th day of February, 1890, denying the said defendant's motion for a new trial upon the minutes of the court.

The action was brought to trial at the Erie County Circuit on the 11th day of December, 1889, and a verdict was rendered in favor of the plaintiff for the sum of \$2,500.

James Fraser Gluck, for the appellant.

Frank R. Perkins, for the respondent.

CORLETT, J. :

On the evening of October 27, 1888, the plaintiff, her husband and a neighbor named Jacobowski, were going to Rilings' planing mill, in the city of Buffalo, on Clinton street, on business. They went down Clark street to Fillmore avenue, along that avenue to the space between the West Shore Railroad tracks and the New York Central tracks; then westerly along that space to Oneida street, and from that point along the sidewalk on the southerly side of that street across the three tracks of the New York Central and Hudson River Railroad Company, to the west bound track of the defendant, upon which the accident occurred. On that track an engine was backing in from East Buffalo towards the city with a tender and caboose. The tender came first, the reversed engine next and the caboose, coupled to the head of the engine, last. The rear of the tender struck the plaintiff's intestate and Jacobowski on the crossing, killing them both instantly. The plaintiff was about three feet behind the men at the time of the accident.

On the northerly of the Central's tracks, cars were standing from within twenty feet of Oneida street up to near Montgomery street. A passenger train had just passed on the east bound Central track lying next to the one on which the accident occurred. The rear lights of that train were in sight when the engine and caboose which caused the injury came along. It was between six and seven o'clock when the accident happened and very dark.

The testimony on the part of the plaintiff tended to show that the plaintiff and the persons killed went on the sidewalk on Oneida street, along which they walked across the New York Central and Hudson River Railroad tracks, the two men in front and the plaintiff three feet behind. That as they approached the defendant's track the plaintiff watched for a train passing up or down; that she looked both ways; saw no light or car coming; heard no noise; saw no flag-man; heard no one call to them, and did not hear any bell or whistle; that under such circumstances the men stepped upon the defendant's west bound track and were struck by the rear end of the tender and killed. The plaintiff stood on the sidewalk.

The defendant's evidence tended to show that proper signals were given as the engine and tender approached the crossing; that the persons killed were trespassing on the defendant's tracks, and that they were warned and urged not to cross by the flagman, but that his warnings were unheeded. The evidence on the part of the plaintiff tended to show the reverse. The plaintiff's evidence also tended to show that the engine and tender drawing the caboosé were being backed down at the rate of five miles an hour, crossing numerous streets on a dark night without signal lights, which could be seen at the crossings, and without warnings that could be heard; also, without a flagman to give warning, and that none was given. The evidence also tended to show that there was no head-light to throw light upon the tracks in front of the moving train to enable those in the cab to see what was on the track; that the tender was broader than the front of the engine and would partially hide the track in front; that the train was being run in the dark, and those on it were unable to see what they were approaching, and that such was the situation when the men were killed.

The plaintiff, as administratrix of her husband, brought this action to recover damages for his death. It was tried in February, 1890, at the Erie Circuit, before Justice DANIELS and a jury. At the close of the evidence the defendant's counsel asked the court to direct a verdict for the defendant upon the ground, among others, that there was no proof of want of contributory negligence on the part of the deceased. This was denied. Exception was taken by the defendant. The jury found a verdict of \$2,500 for the plaintiff. A motion for a new trial was made and denied, and the defendant appealed to this court.

The only substantial controversy on this appeal is whether the deceased was guilty of contributory negligence, and whether the cause was so barren of proof upon that question as to require that the plaintiff should have been nonsuited, or that a verdict should have been directed in favor of the defendant.

In *Parsons v. New York Central and Hudson River Railroad Company* (113 N. Y., 355-364), the rule is thus stated by the judge delivering the opinion: "The question is, whether the injured party, under all of the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence

usually exercise under like circumstances. This rule must in all cases, except those marked *by gross and inexcusable negligence*, render the question involved one of fact for the jury." All the more recent cases are to the same effect. (*Galvin v. Mayor of New York*, 112 N. Y., 223; *Palmer v. Dearing*, 93 id., 7; *Hourney v. Brooklyn City R. R. Co.*, 27 N. Y. State Rep., 49; *Beckwith v. N. Y. C. and H. R. R. Co.*, 28 id., 130; *Tolman v. Syracuse, Bing. and N. Y. R. R. Co.*, 98 N. Y., 203; *Cowan v. Third Ave. R. R. Co.*, 31 N. Y. State Rep., 145.)

The evidence in this case required a submission of this question to the jury. If the plaintiff had received injuries, and she had brought an action to recover damages, it could not be successfully urged, assuming her evidence to be true, that the case should not have been submitted to the jury. While it does not appear what acts of diligence were exercised by the deceased before he stepped upon the track, it does appear what the facts were and the surrounding indications of danger, by the testimony of the plaintiff. If the jury found, as they did, that her evidence was true, it is fair to assume that her husband, the plaintiff being with him, took the same precautions and made the same observations that she did. When it appears that observation and looking both ways would have disclosed no danger, it is not too much to assume that the deceased exercised proper caution before going upon the track, and as he cannot speak upon the subject, it would not be logical or in accordance with human nature to hold that he exercised less caution than his wife, or that he exposed himself to danger without proper precaution. If there had not been any evidence that looking and observing would have disclosed no danger when in fact there was, it could be urged with great force that there was want of affirmative proof of proper diligence. But when it affirmatively appears that diligent observation disclosed no danger, it cannot be urged with any cogency that the person killed neglected proper precaution. Under all the circumstances, it satisfactorily appears that the learned trial justice was right in refusing to nonsuit the plaintiff and directing a verdict for the defendant; also in denying the defendant's motion for a new trial.

The judgment and order must be affirmed.

MACOMBER, J., concurred.

DWIGHT, P. J. (dissenting):

The evidence plainly required the submission to the jury of the question of the defendant's negligence, and amply supported the verdict of the jury in that particular; the question is whether there was evidence to warrant the verdict on the other branch of the case, namely, of the absence of contributory negligence. It is conceded that there was no evidence showing, or tending to show, that the deceased himself exercised any care to avoid the collision which caused his death. His mouth being closed, as well as that of the person most immediately in his company, the court, as well as the jury, would be disposed to seize upon slight circumstances, if such existed, from which the inference might be drawn that he was looking and listening for an approaching train. But of such circumstances there are none, so the learned judge, who submitted the case to the jury and denied the motion for a new trial, substantially concedes. The charge of the court is not in the record, but the opinion which accompanied the denial of the motion for a new trial suggests the ground upon which the verdict in this particular was permitted to be found, and was sustained by the court at the circuit, viz., that the lack of evidence of the requisite care for his own safety on the part of the deceased may be cured by evidence of the exercise of such care on the part of another person in his company or near vicinity. The learned judge says: "No authority has gone so far as to hold that a person in the position of the plaintiff, sustaining the relation she did to one of the deceased persons, by her own endeavor to discover the approach of the train, if one could be seen to have been in the vicinity, would not answer all the requirements of the rule demanding care of a person as near to her as her husband was, before he should undertake to cross a railway." The suggestion seems to be of the possibility of a vicarious satisfaction of the law which imposes the duty of care for his own safety upon a person who enters a position of danger. The proposition is one which would seem to require affirmative authority to support it, and which can hardly stand upon the absence of express authority to the contrary. Undoubtedly the two persons involved might stand in such a position relative to each other as to entitle the one to rely upon the watchfulness of the other. If the deceased had been blind or deaf, or otherwise disabled, and had entrusted himself to

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the care and guidance of his wife, he might have freed himself from the obligation of caring for himself. But here is no suggestion of such a reliance or of the necessity for it. The wife was not leading or guiding her husband; the latter and his friend went first and she followed as she could. There was nothing in the relation or relative position of the two which charged her with responsibility for his safety. The testimony of the wife, to the effect that she looked both ways and saw no light or cars approaching, was, no doubt, admissible as descriptive of the situation, so far as it went. But the cars *were* approaching, and the undisputed evidence shows that the bell on the engine was ringing and the two red lights on the caboose were in sight. The most that can be said is that the light and the sound were not consciously perceived by the witness, or, if perceived, that they did not convey to her mind the impression of an approaching train. Who can say but that, if the deceased had been looking and listening, he might not only have heard the bell and seen the red lights, but also might have been warned by them of the approaching train.

For the reasons indicated, I think the defendant was entitled to a nonsuit, or, at least, that the motion for a new trial should have been granted, and, accordingly, that the judgment and order appealed from should be reversed.

Judgment and order appealed from affirmed.

EMMA K. ENOS, RESPONDENT, v. JOHN A. ENOS,
APPELLANT.

Evidence as to the defendant's wealth and family, in an action for slander.

In an action to recover damages because of the utterance of slanderous words by the defendant, charging the plaintiff with being a prostitute and a thief, evidence was given on behalf of the plaintiff to the effect that the defendant had no children, and that he had property of the value of \$50,000, in regard to which the trial justice charged the jury that the evidence had been permitted, "not for the purpose of affecting your judgment as to the amount of damages he should pay, because you will not be permitted to enhance the damages for the reason that the defendant is a wealthy man, and the evidence was not allowed in the case for any such purpose whatever, but it was allowed for the

sole purpose of showing the effect that was to be given to the language uttered by this particular individual."

Held, that, in an action for slander or libel, the pecuniary circumstances of the defendant are not involved in the issue; and evidence showing him to be rich or poor is not admissible on the question of damages.

That the error in this case was not cured by the charge of the justice that the evidence was proper to enable the jury to determine what weight would be given to the defendant's words.

That a new trial should be granted, as the jury might well have reasoned that the defendant being a man of wealth, and having no family dependent upon him, they should render a larger verdict than if these facts did not exist.

APPEAL by the defendant John A. Enos from an order made at the Yates County Circuit, and entered in the Yates county clerk's office on the 4th day of December, 1889, denying a motion made for a new trial, after a trial before the court and a jury at the Yates County Circuit, at which a verdict was rendered for the plaintiff in the sum of \$3,000.

M. A. Leary, for the appellant.

Calvin J. Huson, for the respondent.

CORLETT, J.:

This action was brought to recover damages for slander. The complaint charges, in substance, that the defendant, at various times during the years 1886-87-88, charged the plaintiff with being a prostitute and a thief. The answer was a denial. The cause was tried at the Yates Circuit, before a justice and a jury, in December, 1889, and resulted in a verdict of \$3,000 for the plaintiff. A motion for a new trial was made and denied, and the defendant appealed to this court.

The plaintiff gave evidence tending to prove the allegations of the complaint. The defendant's evidence controverted that of the plaintiff.

Mason L. Baldwin was sworn as a witness on the part of the plaintiff, and testified that he was a banker and knew the defendant. The witness was asked the following question: "Has Mr. Enos any children living?" The counsel for the defendant objected. Counsel for plaintiff offered to prove that the defendant was a man of means and had no one depending on him for support, to which the counsel for the defendant objected. The objection was overruled and

exception taken. "A. No, I don't understand he has any." "Q. Has he a wife?" "A. Yes, sir." "Q. Do you know the amount of personal property Mr. Enos owns?" The counsel for the defendant objected to this question, as being incompetent and immaterial, and not to be taken into consideration in determining the question at issue here before the jury. Received and exception taken. "A. Yes, in the neighborhood." "Q. How much?" "A. In the neighborhood of \$50,000." The witness also testified that the defendant owned a farm of 100 acres.

The trial justice, in charging the jury on this subject, said: "In the first place, evidence has been permitted here as to the wealth and standing of the defendant, not for the purpose of affecting your judgment as to the amount of damages he should pay, because you will not be permitted to enhance the damages for the reason that the defendant is a wealthy man, and the evidence was not allowed in the case for any such purpose whatever, but it was allowed for the sole purpose of showing the effect that was to be given to the language uttered by this particular individual. You have a right to know the financial condition and standing of the defendant in the community where he resides for the purpose of saying what weight would be given to anything he may say concerning another individual; because a man in the position of this defendant certainly has it in his power, by making a statement, to carry with it greater weight than another person would have who occupied a less prominent position in the society in which he moves. So that you are to consider this testimony solely with a view to arriving at the weight which is to be given by you to the statements which this defendant may have made concerning this plaintiff."

The leading contention on the part of the appellant is, that the trial court erred in admitting the evidence above quoted. The first question objected to was, whether the defendant had any children living. The plaintiff's counsel stated as a reason why the evidence should be admitted, that he would show him to be a man of wealth, and that he had no one dependent upon him for support. After this statement the defendant again objected. It was overruled and exception taken, and the witness answered to the effect that he had no children. Whether the defendant had or had not children could in no way bear upon the question as to how much weight or import-

ance would be attached to the words he used concerning the plaintiff. The only possible purpose of this evidence, in the nature of things, was to show that the defendant had no family dependent upon him for support. This was the view taken by the learned counsel for the plaintiff, for he stated that such was his purpose in offering the evidence. The court, after being fully advised of the reason why the evidence was offered, overruled the objection. How far, or to what extent, the fact that the defendant had no children, affected the jury on the question of damages, it is impossible to determine. They might well have reasoned, as the plaintiff's counsel did, that being a man of wealth, and having no family dependent upon him, they should render a larger verdict than if those facts did not appear.

The other question objected to was an inquiry as to the wealth of the defendant. The ground of the objection was that the evidence was incompetent and immaterial, and not to be taken into consideration in determining the question at issue before the jury. The witness was allowed to answer this question after exception, and the evidence showed he had \$50,000 of personal property, and a farm of 100 acres. In view of what was said after the question was asked in reference to the children, it is difficult to see upon what theory this question was asked, except as bearing upon the question of damages. Both questions, naturally and legitimately, bore upon that subject, and the jury were fully informed as to the defendant's family and property.

It is now the rule in this State that in an action of slander or libel the pecuniary circumstances of the defendant are not involved in the issue, and evidence showing him to be rich or poor is not admissible on the question of damages. (*Dain v. Wycoff*, 7 N. Y., 191-193; *Palmer v. Haskins*, 28 Barb., 90; *Austin v. Bacon*, 49 Hun, 386.)

The trial justice in his charge to the jury in the portion above quoted stated that such was the law; but he treated the evidence as proper for another purpose, stating that the jury had a right to know the financial condition and standing of the defendant for the purpose of showing what weight should be given to his words.

It is the general rule that where improper evidence has been received under objection, which may affect the verdict, it is not

cured by a direction of the judge to disregard it. (*Erben v. Lorillard*, 19 N. Y., 299; *Wright v. Equitable Life Ins. Co.*, 41 Supr. Ct. [9 J. & S.], 1; *Allen v. James*, 7 Daly, 13; *Neuman v. Goddard*, 48 How. Pr., 363; *Travers v. Eighth Ave. R. R. Co.*, 3 Keyes, 497.) It is true that this rule has been somewhat modified in *Gall v. Gall et al* (114 N. Y., 109), and *Holmes v. Moffat* (120 id., 159), but not so as to affect the questions involved in this appeal.

A specific objection must always be taken unless *the evidence in its essential character is incompetent*. (*Tooley v. Bacon*, 70 N. Y., 34, 35; Baylies on New Trials, 179.) It is a familiar rule that where illegal evidence which might affect a verdict is admitted, a new trial must be granted. (*Starbird v. Barrons*, 43 N. Y., 200; *Baird v. Gillett*, 47 id., 186.)

Evidence of the amount of the defendant's property was not admissible on the question of damages, nor was that as to the number of his children. It is difficult to see from an examination of the case for what purpose the evidence objected to was admitted, in view of what occurred at the time, except as bearing upon the question of damages.

Was the evidence objected to admissible on the question of how much weight should be attached to the words spoken? It is difficult to see upon what principle, as a legal proposition, a man's financial ability should increase or diminish the importance of his declarations on the question of another's character. This is well illustrated in the present case, for several witnesses testified that they attached no weight or importance to the defendant's utterances, and still the evidence objected to was held to be competent upon the ground that his financial standing would add weight and influence to his words. The position or standing of an individual speaking slanderous words might bear upon the weight of his utterances, but the amount of money or property he possesses would not naturally affect his credibility, or cause his statements to be more readily believed. If this were so, no reason is seen why a man's wealth might not be proved in all cases where he is a witness for the purpose of increasing the force and cogency of his evidence.

The learned counsel for the respondent cites no case holding that the amount of money a man has adds to the weight or influence

of his statements on questions of character. But in any view of the case, it is impossible to know that the admission of the evidence objected to, on the question of children did not affect the minds of the jury, and it certainly cannot be claimed, as to this evidence, that it could have weight on the importance to be attached to the slanderous words. The fact that a man has or has not children can certainly have no weight in any such direction. The only legitimate effect was to influence the jury in giving the plaintiff a larger verdict because he had no one dependent upon him for support.

Suppose that no evidence of the amount of the defendant's wealth had been admitted, and proof had been offered showing that he had no children or family to support, and it had been received under objection, it could hardly be argued that the evidence was competent ; it could not be construed to be received except for the purpose of showing that no injury would be inflicted upon the defendant's family by finding a verdict against him for a large sum of money. Such evidence would naturally tend to influence the jury on the question of damages.

It follows that a new trial must be granted, with costs to abide the event.

DWIGHT, P. J., and MACOMBER, J., concurred.

Order appealed from reversed and a new trial granted, with costs to abide the event.

THE WATERLOO WOOLEN MANUFACTURING COMPANY, RESPONDENT, v. JAMES SHANAHAN, AS SUPERINTENDENT OF PUBLIC WORKS, JAMES SHANAHAN, INDIVIDUALLY, WILLIAM L. SWEET, JUSTIN B. H. MONGIN AND GEORGE COOK, APPELLANTS, IMPLEADED, ETC.

Public officer — acting under an unconstitutional statute — liability of, to an individual damaged.

Where the superintendent of public works makes a contract for the dredging and excavating of the channel of a river, which is a public highway, in accordance with the provisions of an unconstitutional statute, he is properly made a party

defendant individually, in an action, brought by a person whose rights are affected by such work, to restrain the execution thereof and for damages.

In such case, as the act under which the superintendent makes the contract is unconstitutional and void, the superintendent cannot invoke its protection in defense of his action in contracting for and making the improvements contemplated thereby to the prejudice of the plaintiff.

In such case the superintendent is acting outside of his official authority, and his official position affords him no protection in so doing.

APPEAL by the defendant James Shanahan, as superintendent of public works, and James Shanahan, individually, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Seneca on the 31st day of August, 1890; also an appeal by the defendants William L. Sweet, Justin B. H. Mongin and George Cook, upon questions of law and upon facts, from the same judgment.

The action was brought to obtain a judgment enjoining and restraining the defendants, their servants and agents, from digging, dredging or altering the bed or channel of the Seneca river, or interfering with the plaintiff's right to the same, and to recover the damages which the plaintiff might sustain in consequence of the doing of such acts by the defendants.

Charles A. Hawley, for appellants, Sweet, Mongin and Cook.

Charles F. Tabor, attorney-general, for James Shanahan, as superintendent of public works, and James Shanahan, individually.

Frederick L. Manning, for plaintiff and respondent

CORLETT, J.:

In 1798 Samuel Bear became the owner of land on the south side of the Seneca river, along which he dug a race to a mill. This race leaves the river at the larger or eastern end on Big Island. Seneca river flows from the outlet of Seneca lake, at the village of Geneva, easterly through the villages of Waterloo and Seneca Falls, and finally empties into the Oswego river. It divides the village of Waterloo, one ward being south of the river, the other north. The land on the north side of the river was patented by the State to John McKinstry in 1802, and contained 640 acres, which was conveyed by him to Elisha Williams on the 3d of December, 1807

Before the 6th day of April, 1813, Williams constructed a race or canal for hydraulic purposes, and erected one or more mills on the site now occupied by the plaintiff's factories, adjoining the river. The race conveyed the waters from the river to the mills, furnishing their motive power. The race was on the north side of Big Island, which divides its flow, its main current being south of the island.

The lands owned by Bear on the south side amounted to 100 acres, who continued its owner until 1826. On the 6th day of April, 1813, the Seneca Lock Navigation Company was incorporated. (Session Laws, chap. 144 of 1813.)

On the 20th of April, 1825 the legislature authorized the construction of the Cayuga and Seneca canal. The act provided for the purchase by the State of all the rights and title of the Seneca Lock Navigation Company. (Session Laws of 1825, chap. 271.) The State simply acquired the rights of the Seneca Lock Navigation Company, and no others.

The plaintiff was incorporated in 1836, and is the owner of all the water-power and privileges which Williams had in his lifetime, with the exception of one run of stone. Its property, consisting of large buildings and machinery, is valued at \$250,000; employs three hundred men in the manufacture of woolen goods. Its average insurance is about \$350,000. A protection of the property insured requires the use of force pumps propelled by water.

Bear race is now owned by the defendants, Sweet, Mongin & Cook. Their mill is at the end of it, and their title was derived by mesne conveyances from Bear. The mill is on Washington street, in Waterloo, and the race draws its water from the south side of Seneca river,. They obtained title three or four years ago, paying for the mill, lands and water privileges, \$9,000.

The canal of the Seneca Lock and Navigation Company was originally of the width of forty feet, and three or four feet deep. In 1840 an act was passed authorizing improvements of the Cayuga and Seneca canal, which expressly provided that the rights and interests of persons owing or holding hydraulic privileges on the outlet should not be injured by such improvements. Prior to 1857 this canal was enlarged and deepened until its present dimensions are seventy feet on the surface, with a depth of from seven to nine feet. There has been no increase in size or depth since 1857, but

by the previous enlargement the amount of water taken into the canal was greatly increased. The plaintiffs now own twenty-eight-thirtieths of the water-power and its appurtenances.

Before 1888 Bear race always remained at its original dimensions, twenty feet wide, and three and one-half feet deep. Neither Bear race or the Seneca river, at the place where the race leaves it, constitute any portion of the canal system of the State of New York. The race and lands on each side of it are private property, now owned by the defendants, Sweet, Mongin & Cook. The plaintiff, since it became the owner of its property, has always claimed the right to use, and has used, for its own purposes all the surplus waters flowing from the canal that supplies their mills, not necessary for navigation. This user has continued for more than twenty years before the commencement of this action, and was always acquiesced in by the canal authorities.

On the 18th day of May, 1888, chapter 325 of that year became a law. It provides as follows: "The superintendent of public works is hereby authorized, in his discretion, to expend the \$15,000, or so much thereof as may be necessary, which were appropriated by chapter 113 of the Laws of 1887, and directed therein to be applied to improvements on the Cayuga and Seneca canal, towards dredging and excavating the channel of the Seneca river, from its intersection with said canal in the village of Waterloo, to the old Bear race, and thence towards dredging and excavating the said race to Washington street in said village so as to admit the passage of canal boats therein from said canal."

This act was passed by a three-fifths vote, but did not receive a two-thirds vote of the members of either house of the legislature. In pursuance of the provisions of this act, the defendant Shanahan, who was and still is superintendent of public works, made a contract with the defendants Fuller and Albaugh for the performance of the work specified in the act. They were engaged in its construction and had the work partly completed when this action was commenced. If the contract is finished, Bear race will be considerably more than thirty feet wide and deeper than at present, and will draw from the Seneca river an amount of water much larger than now, and will greatly diminish the surplus in the canal, to which the plaintiff is entitled.

On the trial the facts above stated, with others, were found by the court. The court also determined, among other things, as questions of law, that chapter 325 of the Laws of 1888, appropriating the moneys for the improvements of Bear race was a local act, and not having received a two-thirds vote of either house of the legislature, was unconstitutional and void; also, that the purpose for which the race was to be improved was not public but private, and that, by the improvement, the water-power of the plaintiff would be seriously diminished and impaired, and its value greatly reduced; also, that the effect of the act is to take the property of the plaintiff for a private purpose, and was void for that reason.

There is no question about Seneca river being a public highway. If the trial court was right in its conclusion that the act of 1888 was void, all difficult questions are eliminated from the case. The pivotal facts involved in a determination of this question are within a narrow compass. As between the plaintiff and the State there was neither doubt or confusion until that act.

In the *Silsby Manufacturing Company v. The State of New York* (104 N. Y., 562) chapter 144 of the Laws of 1813, above cited, and chapter 271 of the Laws of 1825, were construed. The court held that the State, having acquired "the stock, property and privileges belonging or appertaining to" said company, and only that, has no authority to use any more of the waters of said river than are necessary for the purposes of navigation, and has the right to use them only for that purpose. No question arises upon the evidence as to Bear race, or its ownership, including the lands on each side; it was private property. But chapter 325 of the Laws of 1888 not only provides for excavating the channel of the river, but also for dredging and excavating Bear race to Washington street, in that village. To that extent, therefore, the act provided for work by the State upon private property without title in the State or provision in the act for acquiring it.

In the *People v. Allen* (42 N. Y., 378), construing chapter 880 of the Laws of 1869, it was decided, upon facts no stronger than those appearing on behalf of the plaintiffs in this case, that the act was for local purposes, and not having received a two-thirds vote was unconstitutional and void. It is impossible to distinguish the principle decided in that case from the one involved in the case at

bar To the same effect are *People v. Supervisors of Chautauqua* (43 N. Y., 10); *Matter of Deansville Cemetery Association* (66 id., 569), where it was also held that the question whether private property is sought for public use is a judicial one to be determined by the courts. On the same point is *Matter of Niagara Falls and Whirlpool Railway Company* (108 N. Y., 375).

The principle involved in this case has been adjudged in numerous decisions arising upon a great variety of facts. (*Jordan v. Woodward*, 40 Me., 317; *West River Bridge Co. v. Dix*, 6 How. [U. S.], 507-547.) The trial court logically considered and determined this branch of the case. The use of this money was obviously for a private and not public purpose.

The learned attorney-general in his exhaustive brief argues, with force and cogency, that Shanahan, as superintendent being a public officer, could have no adjudication against him in this action. His contention would be unanswerable if he was acting in that capacity. When it appears that there is no law authorizing this contract, the fact of his occupying a high public position is immaterial. (*People of New York v. Canal Board of New York*, 55 N. Y., 390; *Tribune Assn. v. The Sun*, 7 Hun, 175.)

In this case the act under which the superintendent made the contract being unconstitutional and void, the superintendent could not invoke its protection in contracting and making improvements to the prejudice of the plaintiff. He was acting outside of his official authority, and his official position is no protection.

The learned counsel for the appellant argues, with much pertinacity and ability, that although the act as framed might fall short of being a public one, yet as its recitals indicate that it was only part of a legislative scheme, subsequent laws would make it complete for public purposes; that, therefore, it was not private but public.

One difficulty with the argument is that there is nothing in the act to show that there will be future legislation; another, and perhaps more serious one, is that public policy, in the very nature of things, is adverse to piecemeal legislation of that character. If an act on its face which is not public can be upheld because future acts may make it so, great mischief might result. Constitutional prohibitions might be evaded and overthrown by gradual and indirect approaches. None of the rulings of the trial court to which exceptions are taken involve questions which would change the result.

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There is no controversy between the plaintiff and the State outside of the act of 1888. That being a nullity, any action which would impair the value of the plaintiff's property never has been, and it is presumed never will be, taken by the State.

The defendants, Sweet, Mongin & Cook, insist upon appropriating the supposed rights of the State for their benefit. It is enough to say that there being no controversy between the State and the plaintiff, these defendants are in no position to avail themselves of the benefit of such supposed rights.

The judgment must be affirmed.

DWIGHT, P. J., and MACOMBER, J., concurred.

Judgment appealed from affirmed, with costs.

MARY E. BAGLEY, APPELLANT, v. ADELIA A. JENNINGS,
RESPONDENT.

Stipulation extending the time in which an appeal may be taken.

The parties to an action may, by a written stipulation, extend the time beyond the period prescribed by the statute within which an appeal may be taken from the judgment entered therein.

APPEAL by the plaintiff Mary E. Bagley from an order of the Monroe County Court, entered in the clerk's office of the county of Monroe on the 5th day of March, 1890.

The order appealed from denied a motion, made to dismiss the appeal taken in the above-entitled action to the County Court, on the ground that the appeal was not taken within the time prescribed by the statute.

It appeared that the following stipulation had been signed by the defendant:

MUNICIPAL COURT—CITY OF ROCHESTER.

MARY E. BAGLEY, APPELLANT,	}
<i>against</i>	
ADELIA A. JENNINGS, RESPONDENT.	

It is hereby stipulated and agreed that the plaintiff herein may have the time allowed for appeal from the judgment granted herein

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on the 27th day of December, 1889, in the Municipal Court of the city of Rochester, extended twenty-five (25) days from the 16th day of January, 1890.

And that said twenty-five (25) days shall be considered as an additional time in which plaintiff may serve and perfect her appeal from said judgment.

(Signed.) ADELIA A. JENNINGS,
Defendant.

John F. Dorothy, for the appellant.

Horace McGuire, for the respondent.

CORLETT, J. :

On the 27th day of December, 1889, a judgment was entered in the Municipal Court of the city of Rochester in favor of the appellant for nine dollars and fifty-five cents damages, and five dollars costs, for rent. The time to appeal from the judgment of the Municipal Court would expire on the 16th day of January, 1890. On that day the defendant made a written stipulation extending the plaintiff's time to appeal twenty-five days. The papers show that the purpose of the stipulation was to enable the parties to settle the controversy by arbitration or otherwise. No settlement was had, and an appeal was taken by the plaintiff within the time limited by the stipulation. The defendant moved to dismiss the appeal on the ground that the notice was not served within the statutory time. The County Court dismissed the appeal, and the plaintiff appealed to this court.

Sections 3046 and 3047 of the Code of Civil Procedure limit the time for an appeal in a cause like this to twenty days from the entry of judgment. This limitation was primarily for the benefit of the parties affected by the judgment. The legislature imposed upon the parties desiring to appeal the duty of vigilance, and unless he perfected an appeal within the statutory time, his right to review was lost.

The learned counsel for the respondent cites several cases showing that the court has no power to extend the time to appeal. But he cites no case showing that it is not within the power of the parties to stipulate for an extension of time. It has frequently been held

that a party may waive the right to insist that the appeal was not taken in time. (*Pearson v. Lovejoy*, 53 Barb., 407; *Stubbs v. Stubbs*, 11 Week. Dig., 244; *Pickersgill v. Read*, 7 Hun, 636, *Durant v. Abendroth*, 41 Supr. Ct., 53.)

In *Jacobs v. Morange* (1 Daly, 523) it was held that, "where a court has not jurisdiction of the subject-matter, the consent of parties will not confer it; but a consent that an appeal may be brought after the time has elapsed for bringing it, is not liable to that objection. The appellate court having the general power to review judgments upon appeal, such a consent does not confer it, but is a mere waiver of the right to insist that the time has passed for bringing the appeal."

To the same effect is *Struver v. Ocean Insurance Company* (9 Abb. Pr., 23), where it was held that giving admission of due service of notice of appeal is a waiver of the objection that it was not served within the time to appeal.

It is a familiar rule that a party may waive a statutory, or even a constitutional provision, for his own benefit, and having done so, he is concluded. (*Matter of Application of Cooper, etc.*, 93 N. Y. 507-512.)

In *Staats v. Garrett* (21 Weekly Dig., 39) a stipulation was given to the appellant of time to serve his case. Upon a motion to dismiss the appeal, *because not taken in time*, it was held that an extension of time to serve the case was a waiver of the notice of entry of judgment, and that the appeal was well brought. This was affirmed in 98 New York, 630.

In *Townsend v. The Masterson, etc., Stone Dressing Company* (15 N. Y., 587) it was held that a stipulation made between the parties that no appeal should be taken from the decision of the General Term, was valid, and the appeal was dismissed on that ground.

In the *Matter of the Petition of Lackawanna Railroad Company, Appointing Commissioners, etc.* (98 N. Y., 453), the court say: "Parties by their stipulations may, in many ways, make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional rights; they may stipulate for shorter limitations of time for bringing actions, for

the breach of contracts, than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final and thus waive the right of appeal, and all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced, and generally all stipulations made by the parties for the government of their conduct or the control of their rights in the trial of a cause, or the conduct of a litigation, are enforced by the courts."

The learned county judge fell into the error of supposing that the cases which control his decision included stipulations made between parties. This was a misapprehension. In this case the parties wished time to see if they could stop further litigation by settlement, and it was stipulated to extend the right to appeal, so that in case no adjustment was effected no rights would be lost. This was neither against good morals or sound public policy, and when after that, a party to the stipulation seeks to prevent its enforcement the court will not listen to him.

The County Court has full power and jurisdiction to hear and determine appeals on their merits, and while neither the court or a party, without the consent of the other, can extend the time to appeal prescribed by statute, yet, where they stipulate an extension, they simply determine between themselves the time when the controversy should be submitted to the appellate court, and the statute in no way abridges the power of the parties to extend the time by stipulation. The reasoning of all the cases sustain this view.

It follows that the order appealed from should be reversed.

DWIGHT, P. J., and MACOMBER, J., concurred.

Order of the County Court reversed, with ten dollars costs and disbursements.

Cases
DETERMINED IN THE
FIRST DEPARTMENT
AT
GENERAL TERM,
October, 1890.

**CHARLES HANSEN, APPELLANT, v. CHARLES SCHNEIDER,
JAMES R. MACK AND JOSEPH H. OLCOTT, RESPONDENTS.**

*Employee, injured by the fall of an elevator — when the employer is not liable because
of there having been no safety clutch on it.*

In an action brought to recover the damages resulting from an injury occasioned to the plaintiff by the fall of an elevator in a building leased to the defendants, it appeared that the plaintiff, while in the employment of the defendants, was engaged in placing barrels upon the floor of an open elevator; that while he was endeavoring to start the elevator it was discovered that a brick had become wedged between the elevator and the wall, rendering the former immovable. A person working with the plaintiff, and with his knowledge and at his suggestion, left the elevator to remove the brick, and succeeded in removing it, whereupon, on account of the rope having been slackened in the previous effort to start it, the elevator at once fell into the basement, a distance of about eight feet, seriously injuring the plaintiff, who had remained in the elevator.

This elevator had not been supplied with any safety clutch, but the defendants, who were moving into the premises where the elevator was, were not shown to have had any knowledge of the fact that the elevator had not been provided with such clutch, and the premises had not been long enough in their possession, or subject to their inspection, to charge them with negligence for not ascertaining that this was its condition, there being no proof that the absence of the clutch was so obvious or conspicuous as to be readily seen by persons examining the lofts for the purpose of hiring, which was all that the defendants could have been assumed to have done.

Held, that the defendants could not, under such circumstances, be legally charged with negligence on account of the elevator not having been supplied with a safety clutch.

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APPEAL by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on April 25, 1889, dismissing the plaintiff's complaint after a trial before the court and a jury at the New York Circuit.

The action was brought by the plaintiff, an employee of the defendants, to recover damages alleged to have resulted from an injury received by the plaintiff while in the defendants' employ, by reason of the fall of an elevator upon which the plaintiff was employed, which, it was alleged, had no safety appliances to arrest its descent in case of any accident happening to the machinery or ropes or supports by which it was operated.

John Brooks Leavitt, for the appellant.

Austen G. Fox, for the respondents.

DANIELS, J.:

The plaintiff a Dane, came to this country in 1882, and in December, 1885, he went into the employment of the defendants, at their factory, which was at No. 158 West Twenty-seventh street. He remained in that employment until the 1st of May, 1886, and on that day they commenced to move into the fourth and fifth floors of the next building. The plaintiff was directed to assist, and did so by sweeping up dust and gathering it in barrels.

He and another person in the employment of the defendants placed the barrels upon the floor of an open elevator to take them to the street, where they were unloaded, and the barrels returned to the elevator. The plaintiff, and the person with him also, went into the elevator and the latter endeavored to start it to go to the upper floors again. But the usual efforts for that object proved ineffectual. And then it was discovered that a brick had become wedged between the elevator and a wall rendering it immovable. The other person with the knowledge, and at the suggestion of the plaintiff, then left the elevator to remove the brick, and he did remove it, when, on account of the rope having been slackened in the previous effort to start it, the elevator at once fell into the basement, a distance of about eight feet, producing serious and lasting injuries to the plaintiff, who had all the while remained in the elevator. This elevator had not been supplied with a safety

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clutch, which was described to be a bolt or ball connected with a heavy spring kept in tension by a rope, which when slack or broken permitted the spring to shoot the bolt into the slides in the side posts on which the elevator is guided, locking it firmly and immovably there. And it was for the want of this appliance that the defendants were prosecuted to recover indemnity for the injuries.

But the defendants were not shown to have been aware of the fact that the elevator had not been provided with this or any other clutch. And the premises had not been so long in their possession, or subject to their inspection, as to subject them to the charge of negligence for not ascertaining that this was its condition. Their lease was dated the 13th of February, 1886, but their term or right of occupancy did not commence until the day of the plaintiff's injury. And there was no proof that the absence of the clutch was so obvious or conspicuous as to be readily seen by persons examining the lofts for the purpose of hiring, which is the most they may be assumed to have done. And if that were not the fact, then the defendants could not be legally charged with negligence on account of the elevator not being supplied with a clutch. In this important respect this case differs from those specially relied upon to support the appeal. For, in *Corcoran v. Holbrook* (59 N. Y., 517), the elevator was out of repair to the knowledge of the general agent, which the court held to be imputable to the defendants, rendering them liable to the charge of negligence. In *Stringham v. Stewart* (100 N. Y., 516) the defendant was clearly liable for the condition in which the elevator had been maintained and allowed to be used. And in *Avilla v. Nash* (117 Mass., 318) the defendant was liable for allowing a defective elevator to be used, although that had been forbidden by a rule, but one which was systematically disregarded to the knowledge of the defendant. There had been no such use, nor, indeed, any use, of this elevator by persons riding in it to the knowledge of either of the defendants. And at the left side of the street entrance to the elevator a sign was up forbidding persons riding in this elevator, which was so placed and large enough in its lettering as to be observed by persons proposing to use the elevator. And, although the plaintiff was a Dane, and not acquainted with the English language when he came into the country in 1882, it may be assumed, in the absence of evidence to the contrary, that he

had become sufficiently conversant with the language to enable him to read and understand this sign on the 1st of May, 1886.

By the lease to the defendants the elevators were to be used for freight only. And the fact that another elevator had been used in the other building by the workmen passing up and down, furnished no ground for assuming that this one might be so used, especially as this restriction of its use had been inserted in the lease.

The general rule undoubtedly is, as the plaintiff's counsel has insisted upon it, that the employer is bound to observe reasonable care and attention for the safety of the persons employed in using the apparatus and machinery provided for them. (*Washington, etc., R. R. Co. v. McDade*, 135 U. S., 554.) But in this case the evidence did not prove that the defendants had omitted the observance of this care, or that they knew of, or in any manner sanctioned the use of this elevator by their employees. There were no facts disclosed at the trial which would have sustained a recovery by the plaintiff.

The judgment should, therefore, be affirmed.

VAN BRUNT, P. J., concurred; BRADY, J., dissented.

Judgment affirmed.

THE COMMERCIAL UNION ASSURANCE COMPANY
(LIMITED) OF LONDON, RESPONDENT, v. HENRY C. BAUER,
APPELLANT, IMPEADED WITH PETER KOENNE.

An answer that the defendant "signed a paper substantially of the tenor and effect set forth in said complaint," followed by a denial of knowledge or information "whether the same was duly signed and executed," admits the execution and sealing of the paper.

In an action to recover upon a bond the complaint alleged that the defendants duly signed, executed and delivered their certain bond, or written obligation, to the plaintiff. The answer of one of the defendants alleged "that on or about the 28th day of January, 1886, this defendant signed a paper substantially of the tenor and effect set forth in said complaint, and left the same with one James W. Wheaton, but this defendant has no knowledge or information sufficient to form a belief as to whether the same was duly signed and executed by the

defendants, or whether the same was duly delivered to the plaintiff as alleged in said complaint."

Held, that, under the pleadings, this defendant was not at liberty to give evidence to show that he had not executed the bond, or that it had not been sealed by him.

APPEAL by the defendant Henry C. Bauer from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 13th day of January, 1890, in favor of the plaintiff, after a trial before the court and a jury at the New York Circuit, at which a verdict was rendered in favor of the plaintiff for \$2,011.25.

The action was brought upon a bond alleged to have been executed by the defendants, conditioned that James W. Wheaton would discharge well and truly his duties as agent of the plaintiff, etc.

Robert E. Connelly, for the appellant.

John Notman, for the respondent.

DANIELS, J. :

The verdict was directed for the amount owing by James W. Wheaton, for moneys received by him, as the plaintiff's agent, and which he had failed to pay over. The defendant Bauer was held liable for the amount under the obligations of a bond executed by himself and the other defendant as sureties for the agent. The amount for which the agent was in default was proved by his reports and accounts, and that proof was not controverted upon the trial.

But the defendant's counsel propounded questions to him as a witness in his own behalf, which were expected to obtain answers showing that the bond was not filled out nor sealed when he subscribed his name to it. These questions were objected to by the plaintiff's counsel, and the answers were excluded by the court. The evidence was considered to be inadmissible under the issues framed by the defendant's answer. And whether that was the correct view to be taken of the pleadings is the sole point raised by the appeal.

That part of the complaint which alleged the execution of the bond is as follows :

Second. That on or about the 28th day of January, 1886, the said defendants duly signed, executed and delivered their certain bond

or written obligation to the plaintiff, dated on said last-mentioned day, and sealed with their seals, wherein and whereby they jointly and severally bound themselves, their respective heirs, executors and administrators to this plaintiff in the sum of \$2,000, upon the condition (it being recited in said bond that "said James W. Wheaton has been appointed agent of the plaintiff at Brooklyn, E. D., in the County of Kings, New York") that if the said James W. Wheaton should well and truly discharge his duties as such agent, and should pay over to the plaintiff all funds thereto received by him as such agent, and should well and truly conform to and obey all the regulations of the plaintiff, communicated to him from time to time touching the issuing of policies, the collecting of premiums thereon and all other matters pertaining to the business of the said agency, then the said bond or obligation should be null and void, otherwise to remain in full virtue, force and effect; and that it was further provided in said bond that proof of the plaintiff's incorporation was waived.

And the entire answer to these allegations was, that on or about the 28th day of January, 1886, this defendant signed a paper substantially of the tenor and effect set forth in said complaint, and left the same with one James W. Wheaton; but this defendant has no knowledge or information sufficient to form a belief as to whether the same was duly signed and executed by the defendants, or whether the same was duly delivered to the plaintiff as alleged in said complaint, and said paper is the same alleged in the complaint to be the bond or written obligation of defendant, and no other. The residue of the complaint, as well as of the answer related to the fact of Wheaton's default and the amount of it. And these matters were distinctly put in issue.

But it is reasonably clear that the answer was not intended to deny the execution of the bond by the defendant. It contains a distinct admission that he signed an instrument of the tenor and effect of that set forth in this part of the complaint, without any denial that it had been sealed by him. And that omission to deny was of itself an admission that it had been sealed by him. The admission expressly made was, that the instrument he signed was substantially of the tenor and effect set forth in the complaint, and that, as the plaintiff

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had described it, was a completed instrument, filled out and sealed by the defendant. He, therefore, was not at liberty to controvert these facts, or either of them, by proof at the trial. By his answer he had, in its legal effect, admitted them, and had thereby excluded his right to disprove them by evidence.

The judgment, consequently, was right, and it should be affirmed.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment affirmed.

JOHN EGMONT SCHERMERHORN, AS TRUSTEE, ETC.,
RESPONDENT, v. MARY S. FARLEY AND PATRICK FAR-
LEY, INDIVIDUALLY AND AS ADMINISTRATOR, ETC., APPELLANTS,
IMPLEADED WITH FRANKLIN A. THURSTON AND OTHERS.

The possession of a bond and mortgage by the agent effecting the loan—confers no authority to receive the principal secured thereby, before it becomes due.

In an action brought for the foreclosure of a mortgage it appeared that the money secured thereby had been loaned for the plaintiff, through the agency of a firm of attorneys, with which the bond and mortgage had been left by the plaintiff. The firm intrusted the business to the immediate control of a clerk, to whom the interest on the debt was from time to time paid, and was by him indorsed upon the bond, which, with the mortgage, was accessible to him, and to whom it was claimed by the defendants that the principal sum secured by the mortgage had been paid. This payment of the principal was made before the same, by the terms of the bond and mortgage, became due.

Upon the trial evidence was offered to show such payment of the principal, which was rejected, although the defendants proved that the bond and mortgage had been surrendered by the clerk, with a discharge purporting to be subscribed with the name of the plaintiff, the execution of which had been proved by the clerk as a subscribing witness, and that this discharge had been filed with the register and the mortgage discharged of record. It appeared, however, that the plaintiff had not signed such discharge.

Held, that the payments of the principal, which took place prior to the time that the principal sum secured by the mortgage became due, were not good as against the plaintiff, as no authority had been conferred by him, either upon the firm or upon its clerk, to anticipate the day of payment by receiving any part of the principal sum before it became due.

That possession of the bond and mortgage, in the absence of any other actual authority, conferred no power to collect or receive the money before it became due.

That the plaintiff was entitled to enforce payment of the bond and mortgage.

APPEAL by the defendants Mary S. Farley and Patrick Farley individually and as administrator of the estate of Eliza M. V. Farley, deceased, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York, on the 7th day of January, 1890, after a trial before the court, without a jury, by which it was adjudged that the sum of \$17,000, secured by a certain bond and mortgage, to foreclose which the action was brought, with interest thereon, was due and owing to the plaintiff; that the plaintiff was entitled to a judgment foreclosing the rights of all parties to the action and directing a sale of the mortgaged premises.

Field & Deshon, for the appellants.

Jones & Roosevelt, for the respondent.

DANIELS, J. :

The judgment, from which the appeal has been brought, is for the foreclosure of a mortgage upon premises known as 1990 Madison avenue, and the sale of the premises, and the recovery of any deficiency thereafter remaining, against Patrick Farley, as administrator of Eliza M. V. Farley, deceased. The mortgage was given by the defendant, Franklin A. Thurston, who was at that time the owner of the premises, to secure a loan made to him by the plaintiff, amounting to the sum of \$17,000. The defendant Thurston conveyed the premises to Terrence Farley, who assumed the payment of the mortgage. And he in like manner conveyed them to Eliza M. V. Farley, who assumed and agreed to pay the mortgage, and upon whose decease letters of administration were issued to the defendant Patrick Farley. She, in her lifetime, conveyed the premises to John T. Farley, subject to the mortgage, and he in the same form conveyed them to Mary A. Farley. The money was loaned for the plaintiff through the agency of the firm of Shipman, Barlow, Larocque & Choate, and the bond and mortgage were left with them for the benefit of the plaintiff. They intrusted the business to the immediate control and disposition of James D. Bedell, who was a clerk in their office, and was placed by them in charge of their real estate transactions of this description. The interest on the debt was from time to time paid to him and indorsed upon the bond, which, with the mortgage, was accessible to him. And in their

answer these appellants, by way of defense, alleged that payment of the principal sum secured had also been made to him for the plaintiff in the action. And upon the trial they proposed to prove that they had made payments to Bedell, who, at the times they were made, had possession of the bond and mortgage, which, it was claimed, had satisfied and extinguished the mortgage debt. But this evidence was rejected, and the defendants excepted. They did prove that the bond and mortgage had been surrendered by Bedell with a discharge subscribed with the name of the plaintiff, the execution of which had been proved by Bedell as a subscribing witness. This had been filed with the register, and the mortgage discharged of record. But the plaintiff testified that his name had not been subscribed by him to the discharge. And there was no evidence that it had been, and the court thereupon found the fact to be that the name of the plaintiff to the discharge had not been placed there by him, or by his authority, and that it was a forgery. The defendants consequently can derive no advantage from the discharge itself or the entry made of it on the record. It was, on the contrary, wholly inoperative.

The payments, which it was proposed to prove had, in the manner already stated, been made, took place in the years 1884 and 1885, while the principal secured by the mortgage did not, by its terms, become due until the 1st day of December, 1886. And it was not proved, nor offered to be proved, that any authority had been conferred by the plaintiff, either on the firm having the business in hand, or upon Bedell, to anticipate that time by receiving any part of the principal sum before its maturity, unless such authority is to be inferred from the possession of the bond and mortgage. There were two other loans made at the same time by the plaintiff to Thurston upon adjacent parcels of property. And their history, and the transactions concerning them, have been made a part of the evidence in this case. For those loans discharges were subscribed and acknowledged by the plaintiff himself, which were to be delivered when the debts secured were paid. But neither the dealings with the other mortgages nor the delivery of these discharges added anything which could be construed into an enlargement of the authority of Bedell, or of the firm in whose employment he was, over the debt or the securities now in controversy. These dis-

charges are stated to have been intended to be delivered when the debts were collected. But no authority was given to collect either debt until the time when it matured. The discharges were provided to be used in that event, and without authority to use them otherwise. The case of the defendants must, therefore, be determined upon the facts relating to it alone, unaffected by these other and disconnected transactions. And from these facts, as no actual authority was delegated to receive the principal before it matured, the authority of Bedell is to be ascertained and defined. And that extended no farther than to collect the interest and the principal as each should become due. The authority to do that is deducible from the possession of the bond and mortgage. That possession, in the absence of any other actual authority, conferred no power to collect or receive the money before it became due. But it was at most to receive it only as it became due, and then to pay it over to the plaintiff. To exceed that by receiving the principal before it became due, would practically change the language and effect of the bond and mortgage, by nominating another time than that mentioned for the payment of the debt, and that the agent under this constructive authority could not do. He had them to collect as they had been made, and not to modify or act upon them differently. And their simple possession was notice to persons dealing with him on the faith of that fact, that such was the utmost extent of his authority. This was the inference considered to be supported by the possession of a note in *Hutchings v. Munger* (41 N. Y., 155). It was there said that "all the evidence of Silence's authority was his possession of the notes for the purpose of receiving the money due thereon. This possession was evidence of his authority to receive payment, but failed to show any authority to do anything else." (Id., 158.) And the principle was applied to commercial paper in the cases of *Burridge v. Manners* (3 Camp., 193), and *Morly v. Culverwell* (7 M. & W., 174). In the last case it was said of a bill that it "is not properly paid and satisfied according to its tenor, unless it be paid when due." (Id., 181.) And it was followed and considered applicable to the payment of a mortgage in *Smith v. Kidd* (68 N. Y., 130). For there it was declared to be the law that, "even though an agent have authority to receive payment of an obligation, this does not authorize

him to receive it before it is due." (Id., 141.) And the principle has not been qualified or enlarged by anything which was decided in *Brooks v. Jameson* (55 Missouri, 505); *Butler v. Dorman* (68 id., 298) or *Seiple v. Irwin* (30 Penn., 513). On the contrary, in the last case the court held that a party making an unauthorized payment took the risk of the integrity of the agent receiving it, and "must bear the loss which his unfaithfulness imposed." (Id., 515.) In the case of *Heermans v. Clarkson* (64 N. Y., 171), the payment was held to be within the authority conferred upon the receiver, and, therefore, to have been legally made, while in this case no authority to receive the principal was either made to appear or offered to be shown.

The case is an unfortunate one for the defendants. But the disaster encountered has arisen from placing too much reliance on the assumed existence of an authority not indicated by the facts themselves. If the proof which was offered and rejected had been received, it would have established no defense. But the plaintiff would still be entitled to enforce and collect the mortgage. The apparent authority of the agent was only to receive the money when it became due, and for a previous payment that afforded the parties paying no protection, as long as the money was never paid over to the plaintiff, but was misappropriated and applied to his own use by the person receiving it.

Other positions have been taken in the brief of the counsel to sustain this appeal. But they are really identical with that already examined. And as that must be overruled, it follows that the judgment should be affirmed, with costs.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment affirmed, with costs.

ALICIA MAUD BLISS, APPELLANT, v. GRACE F. WEST
AND OTHERS, RESPONDENTS.

Delivery of trust deeds — presumed from their acceptance by the trustee and recording, though afterwards found in the grantor's possession — when not void as made in contemplation of marriage — effect of subsequent representations and possession of the property by the grantor.

A testator stated in his will that he had already provided for his three children by an insurance on his life, and by trust deeds made on the 10th day of March, 1887. It appeared that these deeds had each been executed and acknowledged by the trustee, who accepted the estates thereby granted, and the trust thereby created and declared, and covenanted faithfully to perform the same, and that such deeds were recorded on the 11th day of March, 1887.

Held, that these facts were sufficient to support the inference, although the deeds were in the safe of the grantor at the time of his decease, that they had been delivered to the trustee at the time when they were executed.

It was not shown that the property described in the deeds had been conveyed in contemplation or expectation of marriage, or that the grantor was even acquainted with the person whom he subsequently married when the deeds were executed, acknowledged and recorded.

Held, that they could not be adjudged fraudulent as against her for the reason that she was thereby deprived of an estate in dower in this property.

That as the title had become vested in the trustee prior to any negotiations or conference between her and the grantor on the subject of marriage, neither the assertion of title by the grantor before or after his marriage with her, nor his continued control of the property could be attended with such effect.

That the representation of the grantor, that he was the owner of the property, could not divest the trustee of the title to it or subject it to rights or equities in favor of the grantor's wife.

That in view of the fact that, under the terms of the trust, the trustee was directed to apply the net rents and profits to the grantor's use during his life, the fact that the grantor remained in possession of the land described in the deeds, after his marriage and until his death, was not inconsistent with the trust or the delivery of the deeds.

APPEAL by the plaintiff upon questions of law and upon the facts from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 20th day of January, 1890, after a trial at Special Term on the 7th day of November, 1889.

The action was brought for the purpose of having three deeds, made by Charles Bliss, the husband of the plaintiff, to the defendant Grace F. West, adjudged fraudulent as against the plaintiff; that

the defendant Grace F. West be adjudged to account for all money received by her, under and by virtue of the said deeds, and pay the same to plaintiff.

F. H. Cowdrey, for the appellant.

William W. Jenks, for the respondents.

DANIELS, J. :

The plaintiff is the widow of Charles Bliss, who departed this life on the 23d of January, 1889. In September, 1887, he proposed to marry the plaintiff and represented himself to be the owner of two parcels of land in the city of New York, one of which was known as 435 West Thirtieth street, and the other as 235 West Fifty-first street, in that city. Both parcels had been improved, but the former was subject to a mortgage securing the payment of the sum of \$15,000. The plaintiff accepted this proposal of marriage and intermarried with him on the ninth of November following. In May, 1887, the plaintiff commenced residing in the house on the Fifty-first street lot, in which the deceased also resided. And he executed and delivered to her a five-years lease of the other house and lot, dated on the 1st of May, 1887, but not acknowledged until the twenty-third of September following. In the fall of 1888 he entered into a contract for the improvement of the premises on Fifty-first street, and during the marriage two policies of insurance, previously obtained and continued, insured the property to him, and he paid the taxes. At his decease he left a will, by which he gave all his property to the plaintiff after the payment of his debts. This will contained the statement that he had already provided for his three children by an insurance on his life, and by trust deeds made on the 10th of March, 1887.

These deeds were three in number, and each conveyed one-third of these parcels of land to Grace F. West in trust to receive the rents and profits of the premises, and apply so much as might be necessary to taking care of, insuring and keeping in repair the buildings thereon ; and in case it should be deemed necessary by her, then to change, alter, remodel and otherwise improve the buildings, after obtaining the consent of the grantor and the concurrence of the beneficiary in writing, and to apply the residue of the rents and

profits to the use of the grantor during his life, and after that for the use of his daughter Harriet C. Bliss, until Charlotte Bliss, another daughter, attained the age of twenty-one years. Other directions were given for the disposition of the rents and profits in case of the decease of the beneficiary before the attainment of the age of twenty-one years by Charlotte Bliss, and for the final disposition of the remainder after the expiration of the trust estate, by which alone his children and heirs were to be benefited. The other two deeds contained similar directions, but primarily after his own decease, for the benefit of each of his other two daughters, and after the expiration of the trust estates, to be disposed of in a similar manner as the one-third mentioned in the deed which has first been referred to. These deeds were each executed and acknowledged by the trustee who accepted the trust estates thereby granted, and the trusts created and declared, and she covenanted faithfully to perform the same. And they were recorded on the 11th day of March, 1887.

From these facts it was inferred by the court at the trial that the deeds had been delivered to the trustee at the time when they were executed. And the facts were sufficient to support that inference, although the deeds were in the safe of the grantor at the time of his decease. Their execution and acknowledgment by the trustee and the subsequent record made of them evince the intention to have been to vest the trustee with the trust estates for the objects to be obtained by the creation of the trusts. What appears to have transpired fully warrants this conclusion. (*Munoz v. Wilson*, 111 N. Y., 295, 303-305; *Scrugham v. Wood*, 15 Wend., 545; *Wallace v. Berdell*, 97 N. Y., 13.)

The plaintiff's object by this action was to obtain a judgment setting these deeds aside as fraudulent against her, she having been thereby deprived of an estate in dower in this property. But neither the assertion of title by the grantor, before or after his marriage with her, nor his continued control of the property, can be attended with that effect. For the title had become vested in the trustee prior to any negotiation or conference between the grantor and the plaintiff on the subject of marriage. And it was not made to appear that it had been conveyed in contemplation or expectation of marriage either with the plaintiff or any other person. Neither

was it proved that the grantor was even acquainted with her when the deeds were executed, acknowledged and recorded.

The facts which proved sufficient to rebut the inference of delivery in the cases of *Knolls v. Barnhart* (71 N. Y., 474) and *Dietz v. Farish* (79 id., 520), were widely divergent from those appearing here. They were inconsistent with any preceding delivery. While here even the continued control of the grantor was not specially at variance with the fact that the deeds had been delivered to the trustee, for he was entitled to the net rents and profits during his life, and taking them himself fulfilled that obligation. What he did was in harmony with the benefits reserved for himself. And the same answer is applicable to his act in contracting for improvements. That had been contemplated by the provisions contained in the deeds themselves; and neither the insurances, nor the payment of taxes supported the charge of bad faith against him. For the insurances continued after the deeds were made had been previously so effected, while the other policy was in the name of the trustee as owner. And the taxes were, by the deeds, made a charge upon the rents and profits realized from the property.

The most that could be affirmed against the title was the representation of the grantor that he was its owner. But he could not divest it or subject it to rights or equities in favor of the plaintiff by his unfounded claim of title. That had been placed by the deeds beyond his power, and no statement of his could restore his dominion over the land. The deeds were not void on account of the creation of a trust estate for himself for the term of his natural life. The plaintiff was not and is not a creditor of the grantor. And it is in favor of creditors only that the statute avoids trusts of this description. (3 R. S. [6th ed.], 142, § 1.)

The legal principle to which the plaintiff appeals will justify the avoidance of deeds executed previous to marriage with the intention thereby to deprive the wife of her dower in the land conveyed. But the cases brought within the range of this principle have been disposed of upon the effect of the fact that the conveyances were made after the parties had arranged for their future marriage, from which an intent to defraud the wife could be inferred. (*Youngs v. Carter*, 50 How., 410; *Babcock v. Babcock*, 53 id., 97; *Pomeroy v. Pomeroy*, 54 id., 228; *Youngs v. Carter*, 10 Hun, 194.)

The facts of this case fail to place it within this principle or either of these authorities.

The deeds, though voluntary, and for the final benefit of the children of the grantor, appear to have been made in good faith. There was clearly no intention to defraud her in their execution and delivery, for the grantor was under no obligation then to her, either sentimental or legal. And when they are free from the taint of fraud, voluntary deeds, resting on the natural consideration of love and affection, will be sustained by both law and equity. (*Young v. Heermans*, 66 N. Y., 374, 381; *Dygert v. Remerschnider*, 32 id., 629, 650.) And where their execution and delivery have preceded the engagement of marriage, or the anticipation of that engagement, they have been held entitled to be maintained by the courts. (*Littleton v. Littleton*, 1 Dev. & Bat. [N. C. Repts.], 327; *McIntosh v. Ladd*, 1 Humph. [Tenn.], 459.) These cases arose under statutes enacted for the protection of the wife, by the application and enforcement of the principle which has been stated. And in their theory sustain the deeds now in suit.

There were various offers of evidence made, which the court, on objection, rejected. But it is reasonably plain that the plaintiff has not been injured by these rulings against her. If it had been proved that the grantor's estate turned out to be insolvent, or that he had claimed to be the owner of the property, or that the trustee had declared the deeds, after his decease, to be formal only, the evidence could not have affected the rights of these children as they had become fixed by the making and recording of the deeds.

The case was disposed of as the law required it should be and the judgment should be affirmed.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOHN DAVIDSON AND OTHERS v. EDWARD GILON
AND OTHERS, COMPOSING THE BOARD OF ASSESSORS.

Assessment for street pavement under section 878 of chapter 410 of 1882 — a horse railroad company should be assessed for such work.

The provisions of section 878 of chapter 410 of the Laws of 1882, directing an assessment for the paving of a street in the city of New York, to be made among the owners or occupants of all the houses and lots intended to be benefited thereby, were simply a re-enactment of existing provisions of law, and should be construed with the other laws existing prior to 1882 concerning local improvements in said city.

A horse railroad company is benefited by the laying of a pavement in the street between the rails of its tracks, and is subject to assessment therefor; and not to assess such company for such work is a manifest error on the part of the assessors, which it is one of the offices of the writ of *certiorari*, authorized by chapter 269 of the Laws of 1890, to correct.

CERTIORARI to review the action of the members of the board of assessors, and of the board of revision and correction of assessment-rolls, in the matter of an assessment made by the board of assessors for the expense incurred for paving Madison avenue, from One Hundred and Thirty-third street to One Hundred and Thirty-seventh street, in the city of New York.

The writ was applied for upon the ground that the entire amount of the expense of said improvement, including the cost of paving between and about the tracks of the horse railroad belonging to and operated by the New York and Harlem Railroad Company, through the said avenue between the said streets, had been assessed upon houses and lots in the vicinity thereof, and that no part of said expense had been assessed upon said railroad company or its property.

Truman H. Baldwin, for the relators.

G. L. Sterling, for the respondent.

DANIELS, J. :

The expenses of the improvement were mainly assessed upon the property fronting upon the avenue. Before it was either ordered or made, the assessors in their return to the writ have stated the

facts to be, that there was, and is, in said avenue, between One Hundred and Thirty-third and One Hundred and Thirty-seventh streets, a double line of track, owned and operated by the New York and Harlem Railroad Company, as and for a horse railroad, and that the avenue has been paved between and about the said railroad track, and that the amount of said paving has been included in the above gross amount of paving done on said avenue, and assessed upon said houses and lots as aforesaid.

But they assessed no part of the expense of the improvement upon the structure of the company, for the combined reason that in their opinion it had not been benefited by the pavement of the avenue, and it was not under the laws assessable therefor.

The railway was operated by horse-power, employed to move the cars of the company, in carrying and transporting passengers for hire. And in that use it is clear, beyond reasonable ground for controversy, that the railway tracks had been improved and benefited by the pavement. So much of it as was laid between the rails supplied the company with a solid and permanent road-way for the use of its horses, not liable to be affected or impaired by the weather, as the unpaved earth necessarily would be. There was, therefore, no foundation for the opinion of the assessors to rest upon, that the road-bed and structure of the company had not been benefited by the pavement. In this conclusion, adopted by them, there was a manifest error, which it is one of the offices of the writ of *certiorari*, as it has been provided for, to correct. (Laws of 1880, chap. 269.)

The more substantial reason for omitting the railway tracks from the payment of a proportionate part of the expenses of the pavement was the construction the assessors considered it to be their duty to place upon the laws applicable to the assessment of expenses for local improvements. The company had not been in any form exempted from the obligation to contribute towards the expenses, by chapter 825 of the Laws of 1872, under which this part of its railway had been laid. The act was wholly silent in this respect. The authority was provided by it for extending the tracks through this part of the avenue upon the payment of the value of the rights and privileges conferred, to the mayor, etc., of the city, as that should be ascertained by commissioners to be appointed for that

object. But this act contained nothing which, either in language or by implication, relieved the company from defraying the expenses of benefits conferred upon it by the improvement of the avenue.

What it obligated the company to pay was for no more than the right or privilege of laying its tracks in the avenue, and afterwards using them as a street railway. And that is the utmost extent of the advantages derived by the company from that act.

It was, however, considered by the assessors that they could charge the company, or its structure in the avenue, with no part of the expense of the pavement, for the reason that section 878 of chapter 410 of the Laws of 1882 directed the assessment of the expenses to be made among the owners or occupants of all the houses and lots intended to be benefited thereby. And it must be assumed that the literal observance of this language would exclude the company and its railway and require the owners of the houses and lots to defray the entire expense of the improvement.

But the incorporation of this section in the act of 1882 was not its enactment as a law by the legislature. It was no more than its compilation as one of the laws already existing relating to the city of New York. And it derived its force and effect from its own enactment, and not from this compilation. The enactment of it as a law dates farther back even than the 9th of April, 1813, when, in a similar manner, it was made section 175 of chapter 86 (vol. 2, p. 407), of the Revised Laws of the State. And it should now be construed with the other laws since enacted concerning local improvements, and necessarily affecting its meaning and application.

At the time when it was made a part of the Laws of 1813 the use of a street or avenue for a railway was unknown and did not exist. That possibility was not within the knowledge or anticipation of the enacting authority. It has been a more modern development under other laws framed to provide for and regulate its use and enjoyment. Through its existence a valuable property has been created, unknown to and not within the contemplation of earlier laws. And that property has furnished another subject of taxation, and that, too, within the comprehension of laws previously enacted. (*People v. Cassity*, 2 Lans., 294 ; 46 N. Y., 46.) And it has since been defined and declared to be liable to taxation by chapter 293 of the Laws of 1881. And similar progress has been made, though not in as direct

language, in providing for the payment of the expenses of local improvements.

By section 1 of chapter 313 of the Laws of 1874, it was provided and declared that all property, subject to an exception inapplicable to this controversy, should be liable to assessment when it should be benefited "by any improvement or other public work already completed or now being made or performed, and hereafter made, done or performed" And this law has been made section 899 of the act of 1882. Its language is very broad, so much so as literally to include this pavement. And subdivision 2 of section 868 of the consolidation act also provided for the same obligation by directing the board of assessors to assess upon the property benefited the certified amount of its expenses. The direction that this should be done in the manner authorized by law, and in the proportion so authorized, in no way restrains the provisions subjecting all the property benefited to assessment for the expenses. For this phraseology includes no more than the proceedings prescribed for making the assessments. They have been clearly declared and defined, and the assessments are to be made by observing and following that course of proceeding, and the proportion authorized by law to be assessed is so much as the property has been benefited by the improvement to be paid for. No other objects were intended to be subserved by these phrases, but they were adapted to the promotion of what had been otherwise so plainly declared, that all the property benefited by a local improvement should defray the expenses of making it.

And this general principle has modified and enlarged the effect of the section of the act of 1813, which directed the assessment of the expense to be made among the owners and occupants of the houses and lots benefited. And that was considered to be the result of more recent legislation in the case of the *Mayor v. Colgate* (12 N. Y., 140, 153). In 1813 houses and lands were the only property which could be benefited by a street improvement, and it was entirely proper to designate their owners as the persons who should be required to pay the expenses. But since then a new and additional structure has been placed in the streets of cities and villages, which will be as much benefited by their pavement as the houses and lots, and may with equal propriety be directed to divide the expenses with their owners. This advancement since street

railways have been constructed has at all times been within the knowledge of the law-making authority. And there is every reason for concluding, when it was clearly and expressly declared, that the property benefited by a street improvement should bear its expense, that it was intended that street railways should not be exempted from that obligation. And the law has generally been construed to be attended with that effect. (*Troy, etc., R. R. Co. v. Kane*, 9 Hun, 506.) There the law had made the property benefited by a street improvement liable for its expense. And the railway company was, under that principle, required to contribute to the expenses of constructing a sewer deemed to benefit it, although under the surface of the street. And, under general provisions no broader than these affecting the city of New York, a similar liability has been in other instances sustained. (*City of Chicago v. Baer*, 41 Ill., 306 ; *City of New Haven v. Fairhaven, etc., R. R. Co.*, 38 Conn., 432 ; *Northern Indiana, etc., Co. v. Connelly*, 10 Ohio [Critchfield], 159.) And it was applied to the structure of a steam railway in *Peru, etc., Railroad Company v. Hanna* (68 Ind., 562). But that application of the principle was denied in *Philadelphia v. Philadelphia, etc., Railroad Company* (33 Penn., 41) and *Junction Railroad Company v. Philadelphia* (88 id., 424) for the reason that railways of that description would not be benefited by these improvements. The fact itself is different in the case of a street railway, which must be necessarily benefited by laying a permanent stone pavement, as that was which was placed on this avenue between its tracks and rails, and immediately adjacent thereto. And so far as the company owning this railway was benefited by the pavement it should have been proportionately required to bear its expense. The charge of that part of the expense upon the owners of the houses and lots made them, or their property, bear this obligation of the railway company. And that the assessors could not legally do, even if the company itself could not be made to pay for its proportion of the benefit. For the inability to enforce payment for a benefit created against one person or his or its property will supply no legal ground for obliging another to make compensation for that benefit.

But there was no such inability here. For the proceedings, provided for assessing the expense of the benefit to the property of the

railway company, were as well adapted to make that assessment as they were to assess the houses and lots for the benefits received by them. They equally applied to every species of property benefited by the pavement, whether that of individual owners or of a railway company. And in case of failure to pay, the railway could be as readily sold as could be a house and lot. The same means for imposing and collecting, or realizing the assessment exists in one case as it does in the other. And the assessors erred in failing to carry it into effect against the street railway company. Complete authority has been provided for the correction of this error by chapter 269, Laws of 1880. The proceedings are not stayed by the *certiorari*, and the fact that they may have, since the service of the writ, passed beyond the authority of the assessors forms no answer to the right of the relators to a review of them.

The assessment, so far as it has charged them with the proportionate part of the benefit of the pavement, which was received by the railway company improving its structure in the avenue, should be reversed and the proceedings remitted to the assessors to assess the expenses upon the company and its property so far as it has been benefited, and the residue only upon the houses and lots of the relators.

BRADY, J., concurred; VAN BRUNT, P. J., dissented.

Proceedings reversed as directed in opinion.

THE NATIONAL PARK BANK OF NEW YORK, RESPOND-
ENT, v. THE STEELE & JOHNSON MANUFACTURING
COMPANY, APPELLANT.

Mistake of a bank cashier in certifying negotiable paper as good — when the amount paid by the bank under such certification is recoverable by it.

A promissory note made by Mitchell, Vance & Co., April 14, 1887, for \$3,281.88, at four months from date, to the order of the Steele & Johnson Manufacturing Company for goods sold by it to Mitchell, Vance & Co., was, on August 18, 1887, certified by the National Park Bank, where it was made payable, and thereafter was transferred to the Tradesmen's National Bank and credited to

the Steele & Johnson Manufacturing Company. On the day following the note was paid through the clearing-house and the proceeds were received by the Tradesmen's National Bank, and were paid over to the Steele & Johnson Manufacturing Company.

At the time when the note was certified the makers had on deposit with the National Park Bank only \$146.66, and the note was certified under a mistake as to the amount of such deposit. When such mistake was discovered information was sent on August 18, 1887, to Mitchell, Vance & Co., who notified the Steele & Johnson Manufacturing Company, and that company was the next day also notified by the National Park Bank of the existence of such an error, and the money which had been paid upon the note was demanded, but the money was not repaid.

In an action brought by the National Park Bank for its recovery, it appeared that the certification of the note was made by the assistant teller of the bank without any authority from the officers of the bank, and it did not appear that the Steele & Johnson Manufacturing Company had in any way changed its condition by reason of the certification of the note and the payment of the money upon it.

Held, that while the act of the teller in certifying the note, without consulting the state of the account of the makers with the bank, might be careless, yet that that circumstance was not sufficient to prevent the recovery of the money by the bank, and that the bank was entitled to judgment for its repayment.

APPEAL by the defendant, the Steele & Johnson Manufacturing Company, upon questions of law and upon the facts, from a final judgment, entered in the office of the clerk of the county of New York on the 8th day of June, 1889, after a trial before the court and a jury at the New York Circuit, and from an order denying a motion made upon the minutes of the court for a new trial.

The action was brought to recover the amount of a note made by Mitchell, Vance & Co., payable at the plaintiff's bank, which had, before its maturity, been certified by the bank and had been paid by it.

Marston Niles, for the appellant.

Barlow & Wetmore, for the respondent.

DANIELS, J. :

The verdict was directed for the amount held to have been paid by mistake by the plaintiff upon a promissory note made by Mitchell, Vance & Co., on the 14th of April, 1887, for the sum of \$3,281.83 to the order of the defendant, and due in four months after its date. The note was given for goods which the defendant had sold to Mitchell, Vance & Co. And on the 18th day of

August, 1887, it was presented to and certified by the assistant paying teller of the plaintiff. After its certification, which was at the instance of the defendant, the note was transferred to the Tradesmen's National Bank for the benefit of and credited to the defendant. And on the day following the note was paid through the clearing-house and the proceeds received by the Tradesmen's National Bank, and that bank paid over these proceeds to the defendant. At the time when the note was certified the makers had on deposit with the plaintiff no more than the sum of \$146.66. And the assistant teller, who certified the note, testified that he did so in the belief that the account of Mitchell, Vance & Co. with the plaintiff was sufficient to permit the certification of this note. When that was discovered not to be the fact, information was sent to Mitchell, Vance & Co., and they notified the defendant by letter, mailed about six o'clock in the afternoon of the 18th of August, 1887, that the certification of the note arose out of an error on the part of the bank. And on the next day a letter was written and mailed by the assistant cashier of the bank to the defendant again apprising it of the error in the certification of the note, and demanding the repayment of the money which had been advanced upon it in the course of the clearing-house settlements. This was not repaid, and the action of the plaintiff was brought for the recovery of the amount. And at the close of the proofs a verdict was directed in favor of the plaintiff for the amount which it was held it was entitled to recover. No controversy appears to have arisen concerning the amount the plaintiff was entitled to recover, if it was entitled to maintain the action at all.

After the verdict was directed the defendant moved for a new trial, which was denied, and an exception was taken to the denial. But no order appears to have been entered upon this decision. None, certainly, is contained in the case. And whether there were any grounds for the motion cannot be now considered, for it has so long been held that an exception to the refusal to order a new trial is entirely inoperative, as to dispense even with the citation of authorities on that subject. The case, consequently, must be disposed of upon the exceptions arising in the progress and at the close of the trial. The evidence which was given did prove the fact to be that the note had been certified in the manner already mentioned,

under the belief, on the part of the person certifying it, that the account of the drawers in the bank was sufficient to justify this certification. And when that was discovered not to be the fact immediate steps were taken to avoid the payment of the note. But they were ineffectual on account of the inability to discover the party who was the holder of the note. This was not ascertained by the bank until the note itself had been paid. And as soon as that was done, and the note surrendered to the plaintiff, the demand was made upon the Tradesmen's National Bank and the defendant for the return of the money. The bank declined to make the payment. And as it had paid over the money to the defendant, its agency in the transaction had ceased, and it was not liable to refund the money to the plaintiff. But the action for that purpose was properly brought against the defendant. (*National Park Bank v. Seaboard Bank*, 44 Hun, 49.)

The act of the teller in certifying the note without consulting the state of the account of the makers with the bank may be characterized as careless. But that circumstance was not sufficient to prevent the recovery of the money. (*Kingston Bank v. Eltinge*, 40 N. Y., 391; *Lawrence v. American National Bank*, 54 id., 433; *Union Nat. Bk. v. Sixth Nat. Bk.*, 43 id., 452; *Mayer v. Mayor, etc.*, 2 Hun, 306.)

The defendant, through the cross-examination of the plaintiff's witnesses, endeavored to prove the fact that the bank had, on previous occasions, certified the paper of Mitchell, Vance & Co., without reference to the state of their deposit account. But that was stated by the teller to have been done only with the direct authority of one of the officers of the bank, and that it was on occasions when the account of Mitchell, Vance & Co. was immediately afterwards made good, and upon the faith of deposits expected from that company; while in this instance the testimony of the assistant teller was that he certified the note, not under the authority mentioned, or the existence of such an expectation, but wholly upon his own belief that the account of Mitchell, Vance & Co. was sufficient to justify his act. It was not done, therefore, under the authority of any rule or practice observed in the previous certification of the paper of Mitchell, Vance & Co., but solely because of a misapprehension on the part of the teller as to the state of their

account. And that, within the authorities, entitled the plaintiff to the recovery of the money, provided the evidence on the part of the defendant presented no legal defense.

The defendant gave evidence and offered further proof from which it was claimed that it should be exonerated from the obligation to return this money. But it did not appear from the proof which was supplied, neither would it from that which was offered and rejected, that the defendant had changed its condition in any respect by reason of the certification of the note and the payment of the money upon it. It did appear that the note had been given for goods manufactured by the defendant and sold to Mitchell, Vance & Co. And the defendant proposed to prove that the goods were delivered upon the representation that Mitchell, Vance & Co. were solvent and able to pay for them, and that this representation was not true. But if the proof in this manner offered had been received, it would have established no change whatever in the relations existing between the defendant and Mitchell, Vance & Co., upon or after the certification of the note. It might have entitled the defendant to the return of their goods, if they still remained in the possession of Mitchell, Vance & Co. But that right, if it existed at all, was not impaired in any respect by the certification and payment of the note. It was also proposed to be proved that statements were made by Mitchell, Vance & Co., to the agent of the defendant when the note became due, concerning their financial condition and ability to pay it. These representations were excluded on the objection of the plaintiff, to which exclusion the defendant excepted. But while proof of the representations might very properly have been received, the defendant was not injured by its exclusion, for the reason that the evidence afterwards taken was received upon the basis that the representations offered to be proved had, in fact, been made. But although, for the time, these representations may have delayed proceedings for the collection of the note, there was no evidence that this delay resulted in any injury whatever to the defendant. If it had deprived them of their ability to take proceedings for the collection of their debt, and in this manner subjected them to a loss they would not otherwise have incurred, it may be that a defense would have then been made out. (*Kingston Bk. v. Eltinge*, 40 N. Y., 391, 404; 66 id., 625, 626, 627.) But

it did not. For the defendant on the day when it received information that the note had been certified might, if it had been disposed to do so, have returned the money, and taken proceedings for the collection of its debt against Mitchell, Vance & Co. For it was not until the 20th of August, 1887, that the action was commenced by the attorney-general to dissolve the corporation existing under the name of Mitchell, Vance & Co. A still further answer is supplied by the proof to the defendant's position as to this part of the case, and that is that it was in no manner proved that the defendant would have been able to collect the note by any proceedings it could have taken against Mitchell, Vance & Co., between the time of its maturity and the commencement of the suit by the attorney-general. It was proved that at least one asset of the company existed in its favor in the city of Cincinnati, but no proof was given that the defendant had knowledge of this fact or of the existence of property elsewhere which it could regularly have seized or resorted to for the enforcement of the payment of this debt. And it was not shown, therefore, that any change in its position, or in its ability to insure payment, arose out of the delay occasioned by the certification of the note. And neither of the authorities which have been cited to sustain the appeal support the defenses which the defendant endeavored to make.

At the close of the case nine different requests were presented by the counsel for the defendant, upon which it was proposed to submit the case to the jury. But these requests presented no more than legal propositions which the court was not obliged in any view to submit to the jury. The exceptions taken to the refusal so to submit the case, as well as those to the refusal of the motion to dismiss the complaint, and others incidentally referred to in the points, can neither of them be sustained. The plaintiff's case was proved by the evidence. And as no defense was maintained by the additional proof produced or offered on behalf of the defendant, the court was right in directing a verdict for the amount which the plaintiff had been obliged to pay by reason of this certification of the note, and the judgment should be affirmed.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment affirmed.

FRANK WALTON, RESPONDENT, v. PARKE GODWIN,
APPELLANT.

Annual report of a corporation — what false statement as to the capital paid in, is not a material false statement, rendering the officers signing the report liable for its debts.

In an action brought to charge one of the directors of the American Opera Company (Limited) with a debt existing against such company, upon the ground that the annual report filed by such company was false in its statements concerning the amount of capital stock which had been paid in, it appeared that one Henry Seligman, who was named in the report as one of the stockholders, was not, and never had been, the owner of stock in the corporation; that a certificate for ten shares of stock, amounting to the sum of \$1,000, had been sent to him, which he had refused to accept and had returned, and that this amount, as well as an additional sum of \$1,000, for which there was no foundation whatever, was included in the amount of the capital stock of the company stated in the report to have been paid in.

Held, in view of the fact that the jury might have found that \$146,600 of the capital stock of the company had been paid in, that this error, to the extent only of \$2,000, did not make the report "false in any material representation."

That this slight discrepancy could have had no effect whatever upon the connection or dealing of its creditors with the corporation, and that, therefore, the statement could not be a material false statement, rendering the officers who signed the report liable for the debt of the company.

APPEAL by the defendant from a judgment in favor of the plaintiff, entered on the verdict of a jury rendered at the New York Circuit, in the clerk's office of the county of New York on the 24th day of January, 1890, and from an order, dated and entered January 31, 1890, in said clerk's office, denying defendant's motion made upon the minutes of the presiding judge to set aside the verdict and grant a new trial.

Nelson Smith, for the appellant.

William W. Badger, for the respondent.

DANIELS, J.:

The verdict was rendered for the sum of \$4,122.73, against the defendant as one of the directors of the American Opera Company (Limited). The company was incorporated under the authority of chapter 611 of the Laws of 1875. On the 17th day of January, 1887, the annual report of the company was made, and it was filed on the twentieth of February of the same year. This report was signed by the defendant, together with other persons, and the state-

ments contained in it concerning the amount of capital stock which had been paid in, and the names of persons who are stated to have been stockholders were alleged to be untruthful. And it was on that ground that the plaintiff, as the assignee of Henry Bates, was permitted to recover the verdict upon which the judgment was entered. This verdict was recovered for the amount found to be owing to Henry Bates under a contract made by the company with him on or about the 22d of October, 1886. He was employed in the capacity of a tenor singer at the salary of \$125 weekly. He performed no actual service in the capacity in which he had been employed, and he was discharged early in December, 1886. The contract made with him was for a season of thirty weeks, commencing in November, 1886, and it was for the amount of the damages resulting from the refusal to perform the agreement on the part of the company that the verdict in the action was rendered. It appeared in support of the action that the plaintiff had previously recovered a judgment for the same demand against the company itself, and that execution had been issued upon the judgment and returned unsatisfied.

The defendant resisted the action on the ground, among others, that Bates had been discharged from the service of the company by reason of his incompetency. And it had been agreed by the sixth rule, which was made a part of the contract of employment, that he might be discharged in the event that he proved to be an incompetent person. And it was declared in this rule that "the vocal and musical directors shall be the sole judges of the fact and extent of the incompetency in applying this rule." One of the musical directors was examined as a witness upon the trial and testified that rehearsals were had in which Bates took his part, and that he was determined to be an incompetent person by the musical directors, and for that reason was discharged. But the accuracy of this statement was controverted upon the trial. And Mr. Bates himself testified, and so did his wife, that the rehearsals took place prior to the signing of the contract, and that upon their completion he was directed to go and sign the agreement, and that it was so signed on the 25th, or between that and the 27th of October, 1886. The evidence of the plaintiff himself had the like tendency to establish the fact to be that the rehearsal in which Bates was engaged took place

before the making of the agreement, and that there was no examination or rehearsal in which he was afterwards engaged upon which the musical directors determined him to be incompetent. On this evidence the court submitted the question to the jury whether the incompetency of Bates was determined upon by the musical directors for or on account of any incompetency appearing in him after the signing of the agreement. If there was, then the court directed the jury that they should find a verdict in favor of the defendants. But if the rehearsals took place prior to the signing of the contract, then it was held that there had been no such discharge under the agreement as would entitle the defendant to a verdict. And these directions appear to be supported by the agreement itself, and the rule made a part of it. For it contemplated the fact that the incompetency should be subsequently ascertained or discovered to justify the dismissal of Bates from the service of the company. This is the clear import of the agreement and the rule, taken and construed together. And the jury must have been satisfied that no incompetency was found in Mr. Bates after the agreement had been entered into, and that he had not been discharged from the service of the company because of that fact.

In the submission of the case to the jury the judge presiding at the trial directed them that the defendant was liable, in case they found that Mr. Bates had not been discharged under the authority of rule sixth, for the reason that the report was untruthful. And to that an exception was taken on behalf of the defendant. In support of the action it was alleged that the report untruthfully stated that \$148,600 of the capital stock had been actually paid in, and that the several persons who were named as stockholders were not the owners of any stock of the corporation. These were matters which section 18 of chapter 611 of the Laws of 1875 required to be stated in the report. That section required a report "which shall state the amount of capital, and the proportion actually paid in, * * * and the names of its then existing stockholders." And it was proved upon the trial that Henry Seligman, who was named in the report as one of the stockholders, was not and never had been the owner of stock in this corporation. It was also shown that the report was made upon the basis that Seligman

was one of the owners of stock in this company. While it appeared from the testimony of Clifford D. Jaffray, who was at first the bookkeeper and afterwards the paymaster of the company, that Mr. Seligman never became the owner of stock in the company; that a certificate of stock was sent to him which he declined and returned. His certificate included ten shares of stock amounting to the sum, as it is to be inferred from the case, of \$1,000. And it was proved that this amount, as well as an additional \$1,000, for which there was no foundation whatever, were included in the report as part of the capital of the company which had been paid in. Evidence was also given to the effect that other persons named in the report as stockholders in the company were not the owners of the stock charged to them. But as to these persons the books of the company were produced stating them to be the owners of the stock which it was asserted had been issued to them. And the secretary of the company in verifying the report appears to have included these persons as the owners of stock in the company. This report, as well as the books produced and read in evidence, tended to establish the fact that as to these other persons they were the owners of the shares appearing in their names. And as they were interested in maintaining that they were not the owners of such shares, and their denials were in conflict with this other evidence, the court could not direct a verdict upon the testimony given by them to this effect. But if it had been important to ascertain whether they were the owners of the shares appearing in their names, that fact should have been submitted to the jury. But as to Mr. Seligman there was not only his own testimony that he was not the owner of stock in the company, but, in addition to that, the evidence of Mr. Jaffray, who was entirely disinterested. And it did not appear on the books of the company that this person was the owner of any of its stock.

By section 21 of chapter 611 of the Laws of 1875 it has been provided that if any certificate or report made, or public notice given, by the officers of any such corporation shall be false in any material representation, all the officers who have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof. And by the preceding section 18 the amount of the capital actually paid in, and

the names of the persons who are stockholders at the time when the report shall be made, are required to be truthfully stated in it. But, from the evidence which was given at the trial, it could only be assumed by the court that the report was untruthful, to the extent of the sum of \$1,000, in stating the amount of capital actually paid in, and the further sum of \$1,000 represented to be the proceeds of the shares issued to Seligman. And as to this first \$1,000 there was evidence tending to show it had probably resulted from an error in the footing of the items. And that Mr. Seligman was not the owner of stock in the company was a fact appearing beyond ground of controversy. And as the case was tried, it is upon these two facts that the liability of the defendant must be maintained if it is maintained at all. And it accordingly, under section 21 of the act, depends upon the question whether these statements were materially false representations. The law has not defined what shall or shall not be material representations in the report, but that must be determined from the consideration of the act and the nature and object of the report itself. The report has evidently been required as information to the public concerning the financial condition and responsibility of the corporation. This information is intended as a security to persons dealing with the company. And whatever would materially affect their judgment in their dealings, should be regarded as a material representation in the report itself. But if a report proves to be untruthful in representations which would have no effect whatever upon the judgment or conduct of persons dealing with the corporation, such representations could not be consistently held to be material. And it must be by this criterion that the question of the liability of the persons signing the report should be determined, for if it contains untruthful statements, and those statements appear to be so entirely unimportant that they would not affect, in the least degree, the credit of the company or the conduct of persons dealing with it, then they cannot legally be held to be material misrepresentations. And such was the fact as to the representations concerning the amount of the capital stock of this corporation which had been paid in, and the statement that Mr. Seligman was one of its stockholders. These statements were unfounded to the extent only of \$2,000, leaving, as the jury might have found the fact to be upon the evi-

dence, that \$148,600 of the capital stock of the company had been paid in. And there is no reason for concluding that this amount would not as well, or completely, have maintained the credit and standing of the company as would the amount of \$148,600. This slight discrepancy or difference in so large an amount would have no effect whatever upon the transactions or dealings of creditors with the corporation. And for that reason these statements could not be assumed to be, as they appear to have been in the charge of the court, materially false statements, rendering the officers who signed the report liable for its debts.

There was a probability certainly arising from the other evidence in the case that the amount actually paid in was considerably less, but that probability was not so well maintained as to entitle the court to assume the fact to be established by the evidence. But that part of the case should have been submitted to the jury. The evidence as to it was by no means conclusive, and they might on that evidence have found in favor of the defendant. There was evidence that the names of persons had been omitted who were the owners of stock in the company, but this omission by no possibility could have prejudiced the public or persons dealing with the company itself. It would have a tendency to reduce its credit instead of increasing it, which would work no injury whatever to persons in their dealings with the company. And for that reason the omission could not be material.

Other important questions have been presented by the evidence given upon the trial, but it is not necessary at the present time to consider whether the rulings made concerning them are capable of being sustained or not. For, as to this part of the case which has been considered, the court erroneously decided that the defendant was liable in case Mr. Bates had been discharged from the service of the company because of incompetency after the making of the agreement itself.

The judgment and order should be reversed and a new trial ordered, with costs to the defendant to abide the event.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment and order reversed and new trial ordered, with costs to defendant to abide event.

THOMAS KELLEY, RESPONDENT, v. THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY, APPELLANT.

Negligence—duty of an employer defined.

In an action to recover for damages claimed to have arisen from the negligence of the defendant, it appeared that a few days before the accident in question the defendant had purchased a force-pump, to be used in applying whitewash to its premises; that the pump had become clogged, and that the plaintiff was sent for to remove a cap from the apparatus in order to put it in working order, and had loosened one of the screws holding the cap in its place when the whitewash was blown into his eyes by the compressed air, causing the injury complained of. The pump had been manufactured by a company engaged in that business, and had been subjected to the ordinary test to discover whether it was defective, and there was nothing to indicate that the removal of the cap would be attended with any danger.

Held, that as there was no cause for apprehension, there was no negligence in omitting to guard against the accident.

That the law exacts from the employer the exercise of reasonable care and intelligence for the safety and protection of the persons employed, and that when such care and intelligence are exercised the happening of what, at most, are only possible accidents, is part of the risk of the employment against which the person employed is required to guard and protect himself.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 1st day of March, 1890, in favor of the plaintiff; and also from an order, entered in said clerk's office on the 28th day of February, 1890, denying defendant's motion for a new trial, after a trial before the court and a jury at the New York Circuit, at which a verdict was rendered in favor of the plaintiff for the sum of \$2,250.

The action was brought to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendant.

William C. Trull and J. Gerald Irwin, Jr., for the appellant.

John Hardy, for the respondent.

DANTELS, J. :

The verdict was recovered for the damages the plaintiff sustained from an injury to and substantial loss of one of his eyes, by an

accident which occurred while he was in the employment of the defendant. He did machinist's work on the running gear of the company's cars. A few days before the accident the company purchased a force pump to be used in applying whitewash to its premises. It had been used for that object when it became clogged or obstructed and the plaintiff was sent for to remove a cap over the apparatus, to permit it to be again placed in working order. And as he was engaged in doing that, and when he had loosened one of the screws holding the cap in its place, the whitewash was blown into his face and eyes by the compressed air, causing the injury which has been made the subject of complaint. The evidence sufficiently tended to prove that the service was being performed under the directions of the defendant's superintendent, to make that a proper question of fact for the jury. And as he seems to have had the entire control and management, under the directors, of the practical part of the company's business, the action might very well be maintained for any want of care, or negligence on his part, producing the accident. The important inquiry, therefore, must be whether there was any want of reasonable care attributable to him in the directions given to the plaintiff to render this service.

The pump was manufactured by a company engaged in that business, and was subjected to the ordinary test to discover whether it was in any respect defective. And it was selected after that for the defendant by a person who had an acquaintance, derived from experience in the use of the same apparatus. There was evidence in the case on the part of the plaintiff that the work on the interior of the pump had not been smoothly finished. But that could only be discovered by taking the pump apart, and that was not done until after the accident. And as the accident itself was not shown to have been caused in any degree by that defect it can form no circumstance of importance in the decision of these appeals.

The proof tended to show that the pump had become obstructed and clogged by so much wet lime passing into it as to prevent the solution from passing through it, and it was necessary to remove the cap to relieve it by the removal of the compound. This, according to the uncontradicted testimony of one of the witnesses, had been done by himself on other occasions with other pumps without the least danger from any explosion of the lime. And there was

nothing whatever at this time indicating that it would be attended with any danger in this instance. Apparently the apparatus was in good condition, and it was in all respects as observable by the plaintiff when he was directed to perform this service as it was by the superintendent, or any other person who was present at the time. The plaintiff himself testified on his cross-examination that there was nothing about the machine that appeared to me, that I could detect, that looked dangerous, or as if the act which I was about to perform would result in danger or injury to me; nothing at all; I didn't know what the machine was; I didn't know there was anything the matter with the machine; it was a new patent machine they were experimenting on; I did not look at the machine; I was not there long enough to see whether there was any danger or not; I did not inquire as to what the condition of the machine was; I made no inquiry at all. As he observed it, there was nothing to admonish caution, or to suggest inquiry or investigation. And the other persons present appear to have been as free from every suspicion of danger as himself.

The witness Guenther had previous experience in the use of the machine for disinfecting purposes, as he stated, in twenty or thirty stables. He was asked, what was the matter with this one, "and said two chances to one the lever got clogged; * * * I couldn't say what was the matter with it until the cap was taken off: I have taken off the cap before and I thought it was the proper thing to do." He testified further: "I said the cap must be taken off; to loosen the cap," and then some one went and brought Mr. Kelly. He further stated that he had handled these machines for about four months prior to that time, and had no idea or intimation that there was any danger about it. Nor was any evidence given that there was danger in the removal of the cap, being attended with or followed by an explosion of the contents of the pump. And from this, as well as all the evidence in the case, there was no cause for suspecting injury to the plaintiff in the performance of his work. And there was, therefore, no want of care on the part of the superintendent in not taking precautions to guard against any possible occurrence of the nature of that which took place. As there was no cause for apprehension, there was no negligence in omitting to guard against accidents. What the law exacts

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from the employer is the exercise of reasonable care and intelligence for the protection and safety of the persons employed. And when that is observed, the happening of what at most is only a possible accident, is part of the risk of the employment. It is an unforeseen incident of the business against which the person employed is required to guard and protect himself. (*Probst v. Delamater*, 100 N. Y., 266; *Webber v. Piper*, 109 id., 496.)

The only fact which had come to the knowledge of the superintendent which was not expressly brought to the notice of the plaintiff was that the machine had become obstructed with the whitewash drawn into it. And there is no reason for supposing that his conduct was in the least influenced by the want of that knowledge, since there was no ground for expecting that the forceable expulsion of the whitewash would follow the loosening or removal of the cap. As the evidence disclosed the facts, the charge of negligence on the part of the defendant was not sustained, and the exception taken to the refusal to dismiss the complaint was well founded.

The judgment should be reversed and a new trial ordered, with costs to the defendant to abide the event..

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment reversed and new trial ordered, with costs to the defendant to abide event.

ALFRED ELDRIDGE, RESPONDENT, v. THE ATLAS STEAMSHIP COMPANY (LIMITED), APPELLANT.

Negligence — use of a steam winch by a seaman — contributory negligence.

In an action to recover the damages resulting from an injury to the plaintiff's left hand, caused by a steam-winch on board the defendant's steamer, it appeared that the plaintiff shipped as a seaman at the city of New York, and on the morning of the day of the accident was ordered to attend to the working of a winch, in order to control the motion of which the person operating it was required to extend his hand over the wheels to the valve. When the winch was in motion the noise caused by it was so great as to prevent the operator from hearing orders given by the person in charge of the business, and he was obliged to watch that person and operate the use of the winch in accordance

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with different motions of his hand. While extending his hand across the winch to reach and operate the valve the plaintiff's fingers were caught between the wheels and the injury complained of was received.

Evidence was given tending to show that the winch was unsafe by reason of its being uncovered where the wheels were exposed, while the defendant proved that no accident had previously happened from it, and that the hand of the operator, extended to reach the valve, was not required to go nearer than from six to ten inches of the wheel.

Held, that, in view of the position occupied by the plaintiff, his obligation to obey the orders of his superiors, and the confidence which would be inspired by such orders when given, he was not chargeable with contributory negligence in this case.

That it was not error to refuse to charge, that if the plaintiff had an opportunity of seeing the winch before the ship sailed, he must be assumed to have sailed with a knowledge of its condition, and could not recover for an injury caused thereby.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 20th day of February, 1890, after a trial before the court and a jury at the New York Circuit, at which a verdict for \$3,750 was rendered for the plaintiff.

The action was brought to recover for injuries received by the plaintiff while in the defendant's employment.

Everett P. Wheeler, for the appellant.

Jacob Fromme, for the respondent.

DANIELS, J. :

The plaintiff sustained a severe injury to his left hand, resulting in the loss of three of his fingers, in operating a diagonal steam winch on board the defendant's steamer "Alvena" on the 23d of November, 1886, at Aspinwall. He shipped as a seaman and signed articles prior to the commencement of her voyage at the city of New York; and was ordered on the morning of the day of the accident to attend to the working of this winch in shifting cargo, and he obeyed, as it was stated he was bound to do, that order.

There were three winches used upon the steamer for similar objects, and the other two were horizontal and covered, and not liable to accidents of the nature of that encountered by the plaintiff. These others had been in use for about twelve years, and were com-

paratively noiseless. This diagonal winch had preceded the improved winch, had been in extensive use, but had given place to the others when changes were made. It consisted in a lifting apparatus, operated by a steam valve and a large and small cog wheel. And to reach the valve, to control the motion of the winch, the person operating it seems to have been required to extend his hand over the wheels to the valve. When the winch was in motion the noise caused by it was so great as to prevent the operator from hearing orders given by the person in charge of the business over him, and he was obliged to watch that person and regulate the use of the winch from different motions of his hand. The evidence of the plaintiff, which was corroborated by that of other witnesses, is, that he was rendering his services in this manner, and was extending his hand across the winch to reach and operate the valve, when his fingers were caught between the wheels and this injury received.

There was no controversy as to the fact that this winch was uncovered, or that the plaintiff received his injury while he was engaged in operating it. Evidence was given that it was unsafe for want of being covered where the wheels were exposed, and on the part of the defendant that no accident from it had previously happened, and that the hand of the operator extended to reach the valve was not required to go nearer than from six to ten inches of the wheels.

At the close of the plaintiff's case the defendant's counsel moved for a dismissal of the complaint for want of evidence of negligence, and also for the further reason that this was a risk of the plaintiff's employment, and the accident resulted from the plaintiff's own want of care. At the close of the case the motion was renewed. And the defendant excepted to its denial on each occasion.

Upon a previous trial the complaint was dismissed, but that was set aside and a new trial ordered by this General Term, whose decision was a sufficient authority for the submission of the case to the jury. (*Eldridge v. Atlas Steamship Co.*, 55 Hun, 309; 28 N. Y. State Rep., 501.) The further evidence given by the defendant was added to that which had previously been taken. But it was in no respect so controlling as to require the points in controversy to be withheld from the jury. There was, accordingly, no error in the denial of these motions. The plaintiff occupied a position in which

he was bound to obey the orders of his superiors ; and in undertaking to operate the winch, in the condition in which it was, he had reason to believe it could be safely done. Confidence of that nature would naturally be inspired by the orders which were given, and when it emanated from a person whose order the subordinate has bound himself to obey, as the plaintiff as a seaman in the service of the steamer had become bound, that cannot fail to be a fact of importance in the inquiry involving the care of the person rendering the service. And while the defendant was not bound to obtain and supply for this service the best possible apparatus, it was bound to render that which was to be used reasonably secure and safe. And what had been done to secure that end, with the other two in use, was suggestive, at least, of the propriety of adding that or a similar or equivalent safeguard to this diagonal winch. And as it had failed to do that, after acquiring the knowledge supplied by the other winches, and which it must from their employment be assumed to have obtained, there was sufficient to render the case one for the jury on each of these controlling inquiries.

Photographs were produced upon the trial, and a photograph of winch No. 2, which was not the winch in question, was shown to the witness Burrows, and he was then asked whether the frame on the left-hand side was a protection against the cog wheels to the man standing there and working the winch. The witness was not allowed to answer the question, and the defendant's counsel excepted to this ruling. But from the form of the question it cannot be determined that it had any pertinency to the case. It might or might not, for all that appeared, have been a protection for that winch without shedding the slightest light upon either issue in the action. The same witness was asked whether a man could not, in this country, leave the ship after he had signed articles, in case he did not like the looks of her. And an exception was taken to the ruling excluding the answer. Whether he could leave or not was not important, for the plaintiff did not attempt to leave. He was not bound to do so even if he had seen the uncovered condition of this winch before the steamer sailed, which he denied having done. The answer, even if it had been favorable, would have been wholly unimportant, for the reason that he remained and subordinated himself to the orders which were given him.

Whether he was competent to perform the duties of quartermaster after this injury to his hand was not to be determined by the opinion of the witness who was interrogated as to that fact. That depended upon the services to be performed and the apparatus to be used, which could have been clearly stated and described, and in that manner brought within the comprehension of the jury, who would then have been as able to infer what the ability was, as well certainly, as the witness. And when that may be done the fact is not one to be proved by the expression of an opinion, which was all that was asked of the witness.

Neither was there error in the refusal to charge that, if the plaintiff had an opportunity of seeing the winch before the ship sailed, he must be assumed to have sailed with the knowledge of its condition, and cannot recover for an injury caused thereby. This request presented a clear *non sequiter*, and also placed the plaintiff's right to maintain the action wholly on the opportunity to see, whether he had seen or not. But without acquiring knowledge of the fact itself, the opportunity to discover it would not justify a verdict for the defendant. If he entered the employment of the ship with knowledge that the winch was uncovered, then the court, at the request of the defendant's counsel, did charge that he could not recover, but the verdict must be for the defendant. And that was going fully as far as either the law or the facts required the court to interfere for the exoneration of the defendant.

The action was one for the jury, and neither of the exceptions can be sustained, nor was their verdict of \$3,750 in any degree excessive.

The judgment and order should be affirmed.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment and order affirmed.

WILLIAM GASKELL AND OTHERS, RESPONDENTS, v. WILLIAM H. BEARD, CHARLES N. KIMPLAND AND DUNCAN A. GILLIES, APPELLANTS, THE HILTON TIMBER AND LUMBER COMPANY AND OTHERS, RESPONDENTS.

Corporation — covered by the words “person or persons” in the lien law, section 1824, chapter 410 of 1882 — error in the amount stated in the notice of lien to be due.

A corporation may file a notice of lien, under section 1824 of chapter 410 of the Laws of 1882, although such statute provides that such lien may be filed by “any person or persons,” as a corporation, is as completely within the intention of the section as a natural person would be, and is equally entitled to its protection.

When persons are mentioned in a statute corporations are included, if they fall within the general reason and design of the statute.

Although the statute (Laws of 1882, § 1825, chap. 410) provides that the notice shall state the amount claimed, from whom it is due, or to become due, “giving the amount of the demand after deducting all just credits and offsets,” etc., yet where, without any fraudulent intent, and through mistakes on the part of the persons having in charge the details of the business, the amount claimed in the notice of lien is considerably greater than the amount shown by the evidence to be due, the lien will be enforced, notwithstanding such error in the amount claimed in the notice.

APPEAL by the defendants William H. Beard and Charles N. Kimpland from the following parts and portions of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 29th day of May, 1890, that is to say:

First. From so much and such parts of said judgment as determines that the defendant, the Hilton Timber and Lumber Company, has the first lien upon the amount of money declared by said judgment to be due and owing to the defendant Duncan A. Gillies by the defendant, the Mayor, Aldermen and Commonalty of the City of New York.

Second. From so much and such parts of the said judgment as determines that the plaintiff herein have the second lien upon the amount of money declared by said judgment to be due to the defendant Duncan A. Gillies by the defendant, the Mayor, Aldermen and Commonalty of the City of New York.

Third. From so much and such parts of the said judgment as determines that the lien of the defendants William H. Beard and Charles N. Kimpland upon the moneys declared by the said judgment to be due to Duncan A. Gillies by the Mayor, Aldermen and

Commonalty of the City of New York, is the third lien thereon, and subsequent to the alleged lien thereon of the Hilton Timber and Lumber Company and of the plaintiffs.

Fourth. From so much and such parts of said judgment as directs the comptroller of the city of New York to pay over to the defendant, the Hilton Timber and Lumber Company, out of the fund in his hands due from the Mayor, Aldermen and Commonalty of the City of New York to Duncan A. Gillies, the sum of four thousand four hundred and ninety-two dollars and twenty-one cents (\$4,492.21).

Fifth. From so much and such parts of said judgment as directs the comptroller of the city of New York to pay to the plaintiffs herein the balance of the said fund due from the Mayor, Aldermen and Commonalty of the City of New York to Duncan A. Gillies, which balance is by said judgment fixed at the sum of two thousand eight hundred and thirty-two dollars and thirty cents (\$2,832.30).

Also an appeal by the defendant Duncan A. Gillies from the following parts and portions of the said judgment, that is to say :

First. From so much and such parts of the said judgment as determines that the plaintiffs herein have the second lien upon the amount of money declared by said judgment to be due to the defendant Duncan A. Gillies by the defendant, the Mayor, Aldermen and Commonalty of the City of New York.

Second. From so much and such parts of said judgment as directs the chamberlain of the city of New York to pay to the plaintiffs herein any of the moneys to the credit of the said fund due from the Mayor, Aldermen and Commonalty of the City of New York to Duncan A. Gillies, which sum is by said judgment fixed at the sum of two thousand eight hundred and thirty-two dollars and thirty cents (\$2,832.30).

The action was tried before a referee, who filed his report, by which, among other things, the validity of the several notices of lien filed, and the amount due to the several parties filing such notices of lien, were determined.

Matthews & Smith, for the appellants.

Benjamin Estes, for the plaintiffs, respondents.

S. B. Brownell and *S. R. Johnson*, for the Hilton Timber and Lumber Company, defendant, respondent.

DANIELS, J. :

An action was commenced by William Gaskell and others against Duncan A. Gillies and others to enforce a lien for materials supplied to the defendant Gillies in the removal of an old wharf, and the construction of a new one at the foot of Rivington street in the city of New York. Another action was commenced for a like object in favor of William H. Beard and another against Duncan A. Gillies and others. These actions, by consent and on motion, were consolidated, and were afterwards tried together before the referee. By his report he found that there was payable to Gillies under his contract for the work the sum of \$7,324.51, which was in the hands of the comptroller, to be paid as the balance of the contract-price still owing by the city of New York. Against this balance the Hilton Timber and Lumber Company, which was a corporation formed under the laws of the State of Georgia, and a defendant in the action, filed with the head of the department or bureau having charge of the work, and with the comptroller of the city, notices in the form prescribed by section 1825 of chapter 410 of the Laws of 1882, claiming a lien upon this balance for timber furnished and delivered to the contractor in the performance of this work. The plaintiffs Gaskell and others filed a similar notice in their own behalf for materials in like manner furnished and used, and so did the plaintiffs Beard and Kimpland, to enforce a lien in their favor against this sum of money. The balance was insufficient to satisfy the demands existing in favor of these different claimants. The referee concluded that the Hilton Timber and Lumber Company, which was a defendant in both actions, was entitled to be first payed out of the balance, and the firm of Gaskell and others to be next paid, and the plaintiffs Beard and Kimpland to be entitled to payment after the other two demands had been discharged. This left the plaintiffs Beard and Kimpland without sufficient money applicable to the payment of their debt, and they accordingly appealed from the judgment entered upon the report of the referee. The contractor Gillies also appealed from so much of the judgment as sustained the claim of Gaskell and others as a second lien upon the balance remaining unpaid to him for the work done under his contract.

In support of the appeal of the plaintiffs Beard and Kimpland, the position has been taken that this company was not entitled

to enforce its lien against the balance due to the contractor, for the reason that it was not a person, and could not be included in so much of the statute as relates to and provides for this remedy. The objection is that the law has secured the remedy only to "any person or persons who shall hereafter, as laborer, mechanic, merchant or trader, in pursuance of or in conformity with the terms of any contract made between any person or persons and the city, perform any labor or furnish any material toward the performance or completion of any contract made with the city, on complying with the next section, shall have a lien for the value of such labor or materials, or either, upon the moneys in the control of the city, due or to grow due under said contract with said city, to the full value of such claim or demand, and these liens may be filed and become an absolute lien to the full and par value of all such work and materials, to the extent of the amount due, or to grow due on said contract, in favor of every person or persons, who shall be employed or furnish materials to the person or persons with whom the said contract with the city is made, or the sub-contractors," etc. (§ 1824.) And that a corporation is not a person. This section of the law has been very broadly expressed, and its general intention evidently was to create a lien in favor of all persons performing labor or furnishing material to a contractor with the city, to enable him to perform and fulfill his contract. And no reason has been evinced for making any distinction in the right to the lien between a natural and artificial person, as a corporation is recognized as being in judgment of law. The remedy was designed to be general, without discriminating in favor of or against the party by whom the materials should be supplied or the service should be rendered. What was the design of the legislature was to prescribe and create this security in favor of the party who should furnish the materials or perform the service mentioned in it. And a corporation is as completely within this intention of the section as a natural person would be, and is equally entitled to its protection. For, as a matter of justice, no distinction can possibly exist between the merits of a claim for materials furnished by a corporation and an individual, but each is entitled to be equally supported and each may be fairly assumed to be a person within the intention of the act. It will be seen that it has not provided, by the most critical implication, that the person or

persons to be protected shall be natural persons, but the provision is that any "person or persons" furnishing the material or performing the labor or service shall be entitled to the lien. And a corporation is a person within the meaning of this language. As to the effect of such legislation, it has been stated that "the construction is, that when 'persons' are mentioned in a statute corporations are included if they fall within the general reason and design of the statute." (Angell & Ames on Corporations [10th ed.], § 6.) And this seems to follow from the legal definition of a corporation, and that is, that it is an artificial person. (*Marshall v. Baltimore, etc., R. R. Co.*, 16 How. [U. S.], 314, 327.)

In the case of *United States v. Amedy* (11 Wheat., 392) the defendant was indicted for destroying a vessel with intent to prejudice the underwriters. And whether it could be sustained or not depended upon the construction to be given to the language of an act of congress declaring it to be an offense to do the act charged, with intent or design to prejudice any person or persons that had underwritten any policy or policies of insurance thereon. It was insisted, in support of a motion to arrest the judgment, as the insurance was made by a corporation, that no offense had been established within the act. But the court held the objection not to be well taken, and said that "the mischief intended to be reached by the statute is the same whether it respects private or corporate persons. That corporations are in law, for civil purposes, deemed persons is unquestionable." (Id., 412.) This principle of construction was again applied in *Society, etc., v. Town of New Haven* (8 Wheat., 464). That case arose under the treaty with England, declaring that there should be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war, and that no person shall, on that account, suffer any future loss or damage either in his person, liberty or property. And this was considered to be so broad as to include the case of a corporation. In the case of *Beaston v. Farmers' Bank, etc.* (12 Peters, 102), a similar question arose under another statute of the United States securing it priority in the payment of its debts. And it was objected that a corporation was not within the construction which should be given to the

language of the act. But in the opinion of the majority of the court it was said that, "no authority has been adduced to show, that a corporation may not, in the construction of statutes, be regarded as a natural person; while, on the contrary, authorities have been cited which show, that corporations are to be deemed and considered as *persons* when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes." (Id., 134.) And this principle is directly applicable to the disposition of this objection, for the position and relation of the company to the contractor, and the justice of its demand, were identical with those of natural persons endeavoring to enforce the same remedy. In *People v. Rector, etc.* (22 N. Y., 44), a corporation was held by the Court of Appeals of this State to be a person within the meaning of that term as it was contained in the statute of limitations. (Id., 57.) And the principle was also generally followed in *Risley v. Phenix Bank* (83 N. Y., 318). And it is well supported by the legal rule that it is the duty of courts so to construe statutes as to meet the mischief which the law was intended to remedy, and to advance the remedy when that may be done without violating fundamental principles.. (*Dibble v. Hathaway*, 11 Hun, 571.) The referee was accordingly entirely right in overruling this objection as he did at the trial.

A further objection was taken in behalf of the plaintiffs Beard and Kimpland to the allowance of the debt of the Hilton Timber and Lumber Company on the ground that it had exceeded in its notices the amount actually owing to it for the timber which it had delivered. The amount claimed in favor of the company was the sum of \$4,716.69, while the debt, as it was maintained by the evidence, was for the sum of \$4,221.82, which presented an overcharge in its notices amounting to \$494.87. The law, by section 1825 of chapter 410 of the Laws of 1882, has required the notices which are allowed to be filed to be verified by oath or affirmation. And that the notice shall state the amount claimed, from whom it is due, or to become due, "giving the amount of the demand after deducting all just credits and offsets," etc. And because the correct amount of the demand was not stated in the notices, this firm having the third in the order of notices filed, resisted the right of the company to a recovery. It is no doubt true that the intention of the act is, that

a correct statement of the indebtedness or claim should be inserted in the notices. This is required not only for the protection of the contractor himself, but also for that of the subsequent creditors who have similar claims against him. The law intends that a truthful statement shall be made, and has required as much as that from the creditor making it. And if this overcharge remained without any explanation, it might be inferred that a fraudulent augmentation of the debt was intended by the creditor, which would prejudice the claims of others as justly entitled to satisfaction. And that, under the authorities, would be sufficient to defeat a recovery by the creditor chargeable with the fraud. (*Lynch v. Cronan*, 6 Gray, 531; *Hoffman v. Walton*, 36 Mo., 613; *Foster v. Schneider*, 50 Hun, 151; *Hubbell v. Schreyer*, 15 Abb. [N. S.], 300, 304; *Reeve v. Elmen-dorf*, 38 N. J. Law [9 Vroom], 125; *McPherson v. Walton*, 42 N. J. Eq., 282.) And the case of *McMillan v. Seneca Lake, etc., Company* (5 Hun, 12) proceeded upon no departure from this strict rule. For there the excess consisted of no more than the demand for interest, which the court held might be rejected as surplusage. The case of *Morgan v. Taylor* (5 N. Y. Supp., 920), seems to be a departure from the principle maintained by the other authorities. But it is not necessary to determine how far it could be followed in the disposition of these appeals. For evidence was given upon the trial directly tending to prove the fact to be that the overcharge made by the company in its notices was the result of mistakes on the part of the persons having charge of the details of its business. The evidence given to establish this fact was quite satisfactory. It explained the source and the manner through which the error had been produced. And it was proved that it arose out of no disposition to charge against the contractor's balance any more than was actually owing by him to the company. And the referee, for that reason, considered that the statute did not require so strict a construction as to produce a forfeiture of this demand, as has now been insisted upon in support of the appeals. And in following that construction the case has proceeded no farther than litigated controversies are permitted to be carried in the correction of mistakes, and avoiding their consequences. That such a mistake will not justify the exclusion of the demand containing it was held in *Harrington v. Dollman* (64 Ind., 255). And so it was in *Kiel v. Carll* (51 Conn.,

440). And in *Odd Fellows' Hall v. Masser* (24 Penn., 507), it was stated by the court that in these proceedings what was required was good faith. And that appears to have been observed by the persons in charge of the business of the company. A similar objection was considered in *Allen v. Frumet, etc., Company* (73 Mo., 688). There items aggregating \$1,779 were erroneously included in the demand. This was proven to have arisen out of a mistake as to the location of a furnace, and not from any intention to defraud. And it was for that reason held not to "invalidate the whole lien, especially where no one has been injured by the mistake, and the items are easily separable from the balance of the account." (Id., 692, 693.) These authorities, as well as the reason and equity of the statute, sufficiently support the conclusion adopted under the evidence by the referee, to require so much of the judgment as is in favor of the Hilton Timber and Lumber Company to be sustained.

The resistance made by the plaintiffs Beard and Kimpland and the contractor Gillies, to the demand allowed in favor of Gaskell & Co., has been placed upon a very similar state of facts. They included in their notices articles which had been used to improve their own property, and forming no part of the materials appropriated to the construction of the pier. But it was proved upon the trial that this arose out of a mistake and from erroneous advice given to the creditors by their counsel. How he could have supposed that the materials supplied and used for an entirely different and distinct object could be included legally in the claim made against the contractor's balance is somewhat mysterious. But evidence was given from which the referee considered this fact to have been established. It was undoubtedly a liberal view adopted by him for the protection of the creditor against the obvious mistake of his counsel. And as the evidence did directly tend to exhibit this to be the fact, it should not now be held that the referee in his generosity had taken too charitable a view of what was shown to have occurred, for the creditors themselves do not appear to have been responsible for the error brought about in this manner in the statement of their claim. They, on the other hand, appear to have been disposed to demand no more than they were legally entitled to claim. There was no fraudulent enhancement of their demand, as was the case in several of the authorities which have been cited ;

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and the rule which those authorities sustain should not, therefore, be enforced against these plaintiffs. By the disposition which was made of their claim no more has been allowed or recovered than it was entirely just they should receive.

The referee has added to his report a very carefully considered opinion. And for the reasons which he has assigned, and which have also now been stated, this judgment should be affirmed.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment affirmed.

IN THE MATTER OF THE ASSESSMENT OF TAX UPON COLLATERAL INHERITANCES IN THE ESTATE OF WORTHINGTON ROMAINÉ.

The personal property in the State of New York of a non-resident, domiciled in another State, is subject to the New York collateral inheritance tax.

By the provisions of the statutes (chapter 483 of 1885, as amended by chapter 713 of 1887), relating to the collateral inheritance tax, the estate of a non-resident of this State, domiciled in another State, who dies in such latter State leaving no wife or children, and leaving personal property, consisting of bonds and stocks, deposited for safe-keeping within the State of New York, is liable to taxation thereon under such statutes.

The fiction of law that personal property, when the subject of taxation, attends the owner and has its situs at his domicile, must yield to the express provisions of the statute which imposes such tax upon the property of a non-resident.

APPEAL by Amasa A. Redfield, sole surviving administrator of the goods, etc., of Worthington Romaine, deceased, and by Mason Romaine, Charles N. Romaine and Dora M. Romaine, from an order of the Surrogate's Court of the county of New York, made and entered on the 6th day of December, 1889, appointing an appraiser in the above-entitled matter; and also from an order or decree of said court, made and entered on the 22d day of March, 1890, confirming the report of said appraiser and assessing a tax upon the property and interests of the collateral next of kin of said deceased; and also from an order or decree of said Surrogate's Court, made and entered on the 23d day of April, 1890, adjudging

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that the property and interests of the said next of kin are subject to the operation of chapter 713 of the Laws of 1887.

R. L. Redfield, for the administrator and others, appellants.

B. F. Dos Passos, assistant district attorney, for the People, respondent.

BRADY, J.:

Romaine, the decedent, died intestate in Virginia in 1888. He left neither wife nor child. His domicile was in Virginia. He left property in this State which was claimed to be subject to taxation, and upon which a tax was imposed and assessed. Part of the property consisted of bonds and stocks, and was contained in a safe or deposit box and vault rented by the decedent from the Stuyvesant Safe Deposit Company in the city of New York.

The tax was imposed under chapter 483 of the Laws of 1885, as amended by chapter 713 of the act of 1887. The part of the act of 1885, presenting the question herein to be discussed, is as follows:

"After the passage of this act all property which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within this State," etc.

The alteration made by the act of 1887, to which reference has been made, was accomplished by the insertion of a clause after the words "while a resident of this State or," as follows: "If such decedent was not a resident of this State at the time of his death."

Under the act of 1885, which was considered in this department in the *Matter of Tulane*, who was a resident of the State of New Jersey (51 Hun, 213), and which is a kindred case, it was determined that the property of the deceased was not subject to the tax provided for, inasmuch as it had neither passed by will nor by the intestate laws of this State, and had not been transferred by deed, grant, sale or gift; but had passed by the intestate laws of the State of New Jersey, although situated in this State, a case not within the language or the spirit of the statute. And it was subsequently held in the *Matter of Enston* (113 N. Y., 174) that property within this State which passed by will or intestacy from a non-resident decedent to collateral relatives or strangers, was not taxable under the act of 1885; and it would seem, prior to its amendment in 1887, that the act of 1885 applied only to property so passing from

any person who may die seized or possessed of the same while being a resident of the State, and to property within the State owned by a resident and transferred *inter vivos*, to take effect after the death of the transferrer. This decision was made by a divided court; Judge FINCH concurred with Judge DANFORTH, who wrote the dissenting opinion, and in which the learned dissenting judge insisted that the manifest purpose of the act of 1885 was, that property within this State belonging to a decedent, who was a non-resident at the time, should be taxed under its provisions; and it is said in the dissenting opinion: "It is conceded by the learned counsel for the appellant that the confusion thought to be apparent in the words of this act is cured by the amendatory act of 1887 (chap. 713)." The learned judge then refers to the corresponding features contained in that statute, and particularly to the words "if such decedent was not a resident of this State at the time of death," and says that they supply by explicit designation what was implied in the former act, and facilitate the interpretation of other clauses, although he thought them superfluous.

The learned surrogate in deciding this case regarded the foundation of the argument of the learned counsel for the administrator as a legal fiction, namely, that the property sought to be subjected to the tax attends the owner and has its *situs* at his domicile, and expressed the view that the general rule as to the *situs* of personal property could not be disputed, but must give way in all cases where, as said by the Court of Appeals *In re Enston (supra)*, there is something in the policy of the statute or its language which shows a different legislative intent, and then suggests that the policy of the statute of this State imposing a succession tax upon property which was within the State of a person, resident or non-resident thereof at the time of his death, seemed wholly opposed to this rule. And this view is regarded as unanswerable.

In the concluding opinion of ANDREWS, J., in the *Matter of Enston (supra)*, he declared that the Law of 1887 so amended the act of 1885 as to subject to its operation the property within this State of a non-resident decedent, and that the amendment furnished some evidence that prior thereto the proper construction of the section, according to the understanding of the legislature, did not include within its operation such property.

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Whatever may have been the view entertained by the courts of the provisions of the act of 1885, there is no doubt, so far as expressed by the opinion of the court of last resort in the *Matter of Enston*, that the amendment of 1887 subjected property within the State of a non-resident decedent to the tax provided for by the acts under consideration. The fiction to which the learned surrogate made reference in his opinion was one discussed by Judge ANDREWS. It was looked upon as one subject to the policy of the statute or its language, which showed a legislative intent to destroy it, which was clearly done in that statute. The language of the act of 1887 seems so clearly to embrace the property of a non-resident decedent in this State at the time of his death that no controversy can be well maintained with regard to it. It, therefore, applies to property within this State of a non-resident decedent and subjects it to a tax.

For this reason the order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

IN THE MATTER OF THE PETITION OF JAMES C. HAZLETON
TO VACATE AN ASSESSMENT FOR THIRTEENTH AVENUE FROM
TWENTY-THIRD TO TWENTY-FOURTH STREETS.

Assessment — proceedings to vacate — laches in making the application — effect thereon, of the payment of the assessment — statute of limitations.

In an application, under chapter 838 of the Laws of 1858, and its amendments (sections 897-914, chapter 410 of 1882), the petition, in proceedings to vacate an assessment, was served upon the counsel to the corporation of the city of New York on August 17, 1880. A notice of the application for an order vacating the assessment upon the petition, and the proofs which had been taken in the meantime, was not served until February 12, 1890.

The application was made upon the grounds that the assessment, which was confirmed March 9, 1875, was for a repavement laid in violation of law and in violation of chapter 826 of the Laws of 1840. It was conceded in the case that there was no tax valuation, and that, under the Law of 1840, an assessment could not be made for a local improvement above the amount of one-half of the assessment for the purposes of taxation, and also that non-assessment for the purpose of taxation, was a sufficient ground for vacating an assessment for a local improvement.

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The objection of the corporation counsel rested upon the ground: That the court had no jurisdiction to reduce the assessment, because no notice of the application was given to the counsel to the corporation until more than ten years after its confirmation.

Held, that the petition having been served on the counsel to the corporation within the time, and no objection having been taken at the time that the application was made to the court upon such petition, some years thereafter, that there was a waiver of any such ground of objection on the part of the counsel to the corporation.

A second ground of objection was that the assessment could not be vacated after payment thereof had been made to the city.

Held, that, as the payment in this case was made after the proceedings to vacate the assessment had been commenced, the right of the applicant to relief was not affected thereby.

Matter of Lima (17 N. Y., 170) distinguished.

That the statute of limitations was not a bar to the right of the applicant to relief, as although the application was not made to the court within ten years after the confirmation of the assessment, yet the proceedings to vacate the assessment were instituted within such ten years.

APPEAL by the Mayor, Aldermen and Commonalty of the City of New York from an order made at the New York Special Term on the 20th day of March, 1890, in the above-entitled action, by which it was adjudged that the assessment for the Thirteenth avenue paving, between Twenty-third and Twenty-fourth streets, in the city of New York, confirmed on the 9th day of March, 1875, and imposed upon the lots mentioned and described in the petition in this matter, be vacated, and that the lien created thereby, or by any subsequent proceedings, cease, so far as the same affects such lots, and that the comptroller and collector of assessments of said city, and the clerk of arrears of the said city, be directed to cancel and vacate the said lien of record on said lots in the books and records of their office.

George L. Stirling, for the Mayor, etc., appellant.

P. A. Hargous, for the petitioner, respondent.

BRADY, J. :

This proceeding was instituted under chapter 338 of the Laws of 1858, and its amendments, which were subsequently incorporated into the consolidation act. (Laws 1882, §§ 897-914, inclusive, chap. 410.)

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The papers were served on the counsel to the corporation on the 17th of August, 1880, but the notice of the application upon the petition, and the proofs which had been taken in the meantime, were not served until February 12, 1890. Although the petition was served on the 17th of August, 1880, as already mentioned, the notice of application for the order vacating the assessment was founded upon the petition and the proofs which were subsequently taken. In the petition the following reasons were stated as the grounds upon which the petitioner relied for success, viz. :

I. Because there is included in said assessment, and assessed upon the lots of your petitioner, the cost of work for which no contract was made, in conformity with the provisions of the charter of 1873, nor were any bids made for doing said work, or any part thereof, or any competition therefor.

II. That the work, for the expense of which said assessment is imposed, was done without any authority of law, and there are included therein expenses not authorized by law.

III. That said assessment is for a repavement laid in violation of law, and is in violation of chapter 326, Laws of 1840.

It is contended by the learned counsel for the corporation that no evidence was offered to sustain either the first or second of these reasons, and that the respondent must rely upon the third, namely, that the assessment is for a repavement laid in violation of law and is in violation of chapter 326 of the Laws of 1840. It is conceded by him that there was no taxed valuation and that, under the law of 1840, no assessment can be assessed for a local improvement beyond the amount of one-half of the assessment for the purposes of taxation (chap. 326, Laws of that year), and also that non-taxation or non-assessment for the purpose of taxation is sufficient to vacate an assessment for a local improvement. Such is the established rule. (*Matter of Second Ave. M. E. Church*, 66 N. Y., 395; *Matter of Cram*, 69 id., 452; *Matter of Schell*, 76 id., 432.)

And the reliance of the learned counsel is upon two points: First. That the court had no jurisdiction to reduce the assessment, because no notice of the application was given to the counsel to the corporation until after the payment of the assessment, and more than ten years after the confirmation. It appears, however, by the points presented by him that the petition was served on the counsel

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to the corporation on August 17, 1880, and, therefore, that the proceeding to vacate the assessment was instituted at that time. It is true that the application to the court founded upon the petition was not made until some years afterward; but no objection upon that score appears to have been made at the time the application was presented or the proofs taken, and, therefore, the doctrine of waiver might be invoked if it was necessary, which it is not. If the appellant desired to dispose of the proceeding an application could have been made for that purpose. The appellant will not be permitted to indulge in laches and then to take advantage of them. Therefore, there is no force in the first objection.

Another reason assigned why the order should be vacated is, that, after payment of the assessment, the court has no jurisdiction to vacate or reduce the amount of an assessment. This proposition rests upon the decision in the *Matter of Lima* (77 N. Y., 170). In that case, however, no proceedings had been instituted to vacate the assessment, in which respect it differs from this case. It does not apply therefore. When the payment is made, after proceedings commenced to vacate, it does not affect the right of the applicant to relief. (*Matter of Hughes*, 93 N. Y., 512; *Purssell v. Mayor*, 85 id., 330.)

It is also suggested that the statute of limitations barred the right of the respondent to relief, upon the assertion that the application to be of any validity must be made within ten years after the confirmation of the assessment. Here the proceeding was instituted within ten years. Indeed, it was instituted within six years after the assessment was imposed.

It is also insisted, upon a series of authorities, that the petition must clearly and definitely state the particular respects in which the assessment is claimed to be illegal, and that a reason not stated in the petition cannot be inquired into. The answer to that is, that it is definitely stated in the petition that the work was done without any authority of law; that it was a repavement, and that it was in violation of chapter 326 of the Laws of 1840. It is too late now for the counsel to the corporation to effectively urge such an objection. It should have been, but was not, interposed at the time the proofs were taken or the petition presented, but if this be not a correct view of the subject, the allegation that the assessment was unauthor-

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ized by law was sufficient to cover the requirements of the case, in addition to which, however, there is a direct allegation that it was in violation of the Laws of 1840, chapter 326. Admitting that there was an extraordinary lapse of time between the presentation of the petition and the hearing upon the merits, the delay cannot be wholly charged upon the respondent for the reason already suggested, that the appellant could have urged the proceedings to a determination. But, in addition to that, the Court of Appeals in the *Matter of Rosenbaum* (119 N. Y., 24), wherein it appeared that the petition was presented in 1872, some proof taken in 1880, and the hearing in 1888, did not regard the delay as prejudicial to the petitioner's right to be heard and relieved. Beyond this, and lying at the very foundation of this proceeding, and not overcome and not to be questioned, is the fact that there was no authority whatever for imposing the assessment, and the efforts to defeat the petitioner are seemingly entirely technical.

For these reasons the order appealed from should be affirmed.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Order affirmed.

IN THE MATTER OF THE APPLICATION OF THE BOARD OF FOREIGN MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES, IN THE ESTATE OF HENRIETTA A. LENOX, DECEASED.

IN THE MATTER OF THE APPLICATION OF THE BOARD OF HOME MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES, IN THE ESTATE OF HENRIETTA A. LENOX, DECEASED.

THE PEOPLE OF THE STATE OF NEW YORK AND THE COMPTROLLER OF THE CITY OF NEW YORK, APPELLANTS, v. ALEXANDER MAITLAND AND OTHERS, AS EXECUTORS AND OTHERS, RESPONDENTS.

The Board of Foreign Missions and Board of Home Missions of the Presbyterian Church are not exempt from the collateral inheritance tax.

The Board of Foreign Missions of the Presbyterian Church, created by chapter 187 of the Laws of 1862, is liable, under chapter 483 of the Laws of 1885, to the collateral inheritance tax upon a legacy bequeathed to it, as such board is

not exempt from taxation by the act under which it is created, nor does it fall within any of the general classes of exemption from taxation specified in the general statutes of the State.

The Board of Home Missions of the Presbyterian Church created by chapter 287 of the Laws of 1872, is also liable to such collateral inheritance tax for the same reason.

APPEAL by the People of the State of New York and the Comptroller of the City and County of New York from an order of the Surrogate of the county of New York, made and entered in the above-entitled proceeding on the 17th day of October, 1887, in the office of said surrogate, directing the executors under the will of Henrietta A. Lenox, deceased, to pay over to the Board of Foreign Missions of the Presbyterian Church the sum of \$2,500.

Also an appeal by the same parties from a like order of the said surrogate, entered on the 17th day of October, 1887, in the office of said surrogate, directing the executors under the will of Henrietta A. Lenox, deceased, to pay over to the Board of Home Missions of the Presbyterian Church the sum of \$2,500.

IN THE MATTER OF THE BOARD OF FOREIGN MISSIONS:

Benj. F. Dos Passos, for the People, appellant.

Hamilton Odell, for the executors and others, respondents.

DANIELS, J. :

The testatrix by her will, which has been duly admitted to probate, bequeathed the sum of \$50,000 to the Board of Foreign Missions, the petitioner in this proceeding. The sum of \$47,500 of the legacy has been paid to the board, but the residue was withheld under the authority of chapter 483 of the Laws of 1885, for the payment of the collateral inheritance tax. The board considered that to be unauthorized and petitioned the surrogate to direct the payment to it of this residue. And on the hearing of the petition an order was made directing that payment. And it is from that order that the appeal has been brought. And it rests wholly upon the question whether the legacy was liable to the payment of this tax.

The first section of the act has exempted certain devises and bequests from the payment of the collateral inheritance tax, made payable by its provisions. Among these are, "the societies, corpora-

tions and institutions now exempted by law from taxation." And if the petitioner was not exempt from taxation, then its legacy was liable to pay this tax, and the order of the surrogate directing the payment of the amount to the board was made without authority.

The board was incorporated by chapter 187 of the Laws of 1862. But this act did not exempt it from taxation. And its claim to such exemption must depend upon the general statutes of the State. The exemptions which have been thereby declared are contained in volume 1 of the Revised Statutes ([6th ed.], 932-934, §§ 5-16). Those relating to colleges, seminaries of learning and religious organizations are contained in subdivision 3 of section 5, as that has been amended by chapter 397 of the Laws of 1883. But this subdivision, as it has been amended, does not include the case of the petitioner. It is expressly restricted to the creation of other and different exemptions, nor is the petitioner exempt from taxation under subdivision 7 of that section, exempting corporations not made liable to taxation on their capital by the fourth title of the same chapter. That subdivision was considered and construed in the case of *Catlin v. Trustees, etc.* (113 N. Y., 133). And the construction then given to it limited it to certain business and stock corporations, excluding all those of the description of the petitioner. Under neither of these provisions has this board been exempted from taxation. And no other has been made by which exemption from taxation has been secured to it. Consequently it must follow from the general provision, declaring all lands and personal estate liable to taxation, which has not been thereafter exempted (1 R. S. [6th ed.], 931, § 1), that this legacy was liable to the collateral tax mentioned in the first section of the act of 1885.

The order should, therefore, be reversed, with ten dollars costs and the disbursements.

VAN BRUNT, P. J., and BRADY, J., concurred.

Order reversed, with ten dollars costs and disbursements.

IN THE MATTER OF THE BOARD OF HOME MISSIONS.

DANIELS, J. :

The Board of Home Missions of the Presbyterians Church in the United States was created a corporation by chapter 287 of the Laws

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of 1872. But the act did not exempt it from liability to taxation under the general laws of the State.

A legacy of \$50,000 was given to this board by the will of the testatrix Henrietta A. Lenox. And the executors paid the sum of \$47,500 of the amount to the board, reserving the residue for the collateral inheritance tax. The board considered that to be unauthorized and petitioned the surrogate for an order directing the payment to it of this reserved amount. And the surrogate made the order from which the appeal has been brought.

This board has not been exempted from taxation by any law of the State. In that respect it stands precisely as the Board of Foreign Missions does, whose case has been already examined. And for the reasons then given, the order made on the application of this board should be reversed, with ten dollars costs and the disbursements.

VAN BRUNT, P. J., and BRADY, J., concurred.

Order reversed, with ten dollars costs and disbursements.

CELIA R. SIMMONS, RESPONDENT, v. EDWARD C.
HAZARD AND ANOTHER, APPELLANTS.

Affidavit for the examination of a party before trial — when the plaintiff must make it himself.

The affidavit upon which an application is made for the examination of parties defendant before trial should be verified by the plaintiff, as the plaintiff is the only person who can state, as to his own knowledge or intention, in the material allegations thereof.

The affidavit, if verified by the attorney for the plaintiff without any sufficient reason being given therefor, will not justify the granting of an order for such examination.

It is not a sufficient reason that the plaintiff is not within the county in which his attorney resides.

APPEAL by the defendants, Edward C. Hazard and Lewis A. Osborn, from an order made and entered at the New York Special Term on the 10th day of April, 1890, denying the motion of said defendants to vacate an order for their examination as adverse par-

ties, and for the taking of their depositions pursuant to section 873 of the Code of Civil Procedure.

The affidavit, upon which the application for an order for the examination of the defendants was based, was made by one of the attorneys for the plaintiff in the action, who stated therein that "this affidavit is made by deponent for the reasons stated in the verification of the complaint herein." The ground stated in the verification of the complaint was as follows: "That the grounds of deponent's belief are the policies of insurance referred to in said complaint and receipts for money paid thereunder by the insured, all of which are in deponent's possession, the books of the said company and letters and communications received by him from the plaintiff. This affidavit is made by deponent for the reason that plaintiff in this action is not within the county where deponent resides."

C. C. Leeds and Henry Bacon, for the appellants.

Morse & Haynes, for the respondent.

VAN BRUNT, P. J.:

The order for the examination of the defendants Hazard and Osborn should have been vacated, if for no other reason, because the affidavit upon which it was granted was verified by the attorney for the plaintiff without any sufficient reason being given therefor. The reasons given for the verification by the attorney are stated to be those stated in the verification of the complaint, and we find nothing stated in the verification of the complaint as to the affidavit. If the attorney intended to state as a reason the one because of which he states that the complaint was verified by him, it was entirely insufficient. These affidavits should be made by the party, he or she being the only one who can asseverate as of his or her own knowledge or intention; material allegations.

There is nothing in the affidavit under consideration to show that the attorney had any peculiar knowledge as to any of the facts necessary to be established; and as to those as to which he swears he has no knowledge, it may well be that the plaintiff was fully informed.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the order for examination vacated, with leave to the plaintiff, upon payment of these costs and ten dollars

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costs of the motion below, to apply upon additional papers for a new order.

VAN BRUNT, P. J., and BRADY, J., concurred.

Order reversed, with ten dollars costs and disbursements, and the order for examination vacated, with leave to the plaintiff, upon payment of these costs and ten dollars costs of the motion below, to apply upon additional papers for a new order.

ANDREW ROSEBERRY, RESPONDENT, v. KATE M. H.
NIXON, APPELLANT.

When a case should be submitted to the jury, although the evidence is uncontradicted.

Although the general rule is that where a witness testifies distinctly and positively to a fact, and is uncontradicted, his testimony should be credited, yet where the witness, called to prove the defendant's case, was the husband and agent of the defendant, having an interest in the success of the defense, in fact a party to it, the court is bound, under this condition of the evidence, to submit the case to the jury.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 14th day of January, 1889, after a trial before the court and a jury at the New York circuit, at which a verdict was rendered in favor of the plaintiff for the sum of \$300.

E. Bartlett, for the appellant.

Cornelius Fiske, for the respondent.

VAN BRUNT, P. J. :

This appellant claims a reversal of this judgment upon two grounds: First, because the court refused to direct a verdict; and, second, because of some remarks which the court made in submitting the case to the jury.

The last objection is clearly untenable, because the judge expressly told the jury to disregard what he had said to counsel, and that which is objected to formed no part of his instructions to the jury.

The court was right in refusing a direction. It is, undoubtedly, true that the general rule is that where a witness testifies distinctly and positively to a fact, and is uncontradicted, his testimony should be credited; but this rule is subject to many qualifications. One is, that where a witness may be biased by his interest, the case is one for the jury. (*Elwood v. Western Union Telegraph Co.*, 45 N. Y., 549.)

The same principle has been held in numerous other cases. This interest need not necessarily be pecuniary; it may arise from the relationship of the witness to one of the parties. The only witness to prove the defendant's case was the husband and agent of the defendant having an interest in the success of the defense, in fact, a party to it. The court was bound, under this condition of the evidence, to submit the question to the jury.

The judgment appealed from should be affirmed, with costs.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed, with costs.

ANDREW LANGDON, SUMNER W. WHITE AND CHARLES R. HENEAGE, COMPOSING THE FIRM OF ANDREW LANGDON & CO, APPELLANTS, v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, RESPONDENT.

Common carrier—discrimination in its rates between different customers—a complaint, based upon a penal statute of another state, will not be sustained in the State of New York—common-law right.

In an action brought against a common carrier by a shipper of merchandise, it was alleged in the complaint that the common carrier had allowed other shippers certain concessions and draw-backs upon the public rates or prices fixed by it for transportation of merchandise over its lines, which it had failed and refused to allow to the plaintiffs, and that by reason thereof the rates demanded and received by the defendant from the plaintiffs exceeded the rates charged to other parties for like services. It further alleged that these discriminations were made under, controlled by and were in violation of the act of the State of Pennsylvania, through which the defendant's line extended, declaring "that any undue or unreasonable discrimination by any railroad company or other common carrier * * * is hereby declared to be unlawful," and further providing "nor shall any such railroad company or common carrier make any undue or unreasonable

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discrimination between individuals or between individuals and transportation companies in the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered."

For a second cause of action the complaint alleged that the defendant furnished cars to other companies suitable for receiving their merchandise, whereas they required the plaintiffs, at their own expense, to furnish lumber for and do the work of fitting up the cars in a suitable condition to carry their merchandise, and thereby discriminated to the extent of one dollar for each car against the plaintiffs, and then repeated the allegations in reference to the statute of the State of Pennsylvania.

For the third cause of action the complaint alleged that the defendant discriminated against the plaintiffs, when its cars were insufficient to carry all the merchandise offered, in the apportionment of its cars between the plaintiffs and other shippers, to the plaintiffs' damage, and again repeated the reference to the statute of the State of Pennsylvania.

In each count the complaint claimed to recover, for damages, treble the amount of the injuries suffered by the plaintiffs in the premises.

Upon the hearing of a demurrer interposed to this complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, and of the absence of jurisdiction of the courts of the State of New York over the subject-matter of the action:

Held, that the object of the action being to bring the case within the statute of the State of Pennsylvania, and the remedy afforded by that statute being penal in its nature, that the action thereunder was not maintainable in the courts of the State of New York, as such courts would not enforce the penal laws of another State.

That a statute enacted for the purpose of providing a punishment, as distinguished from one affording an indemnity, is penal in its nature.

Seemle, that while an action would lie at common law against a common carrier for withholding from a shipper of merchandise the equality of right which such shipper is entitled to enjoy with other patrons of the common carrier, yet a complaint which restricts the character of the action to a recovery under a particular statute of another State, which provides a penalty for such action on the part of the common carrier, will not justify a recovery of the damages to which the common carrier would be liable at common law for such discrimination between shippers upon its line.

APPEAL by the plaintiffs from an interlocutory judgment of the Supreme Court sustaining the defendant's demurrer, interposed to the complaint in the above-entitled action, and entered in the office of the clerk of the county of New York on the 11th day of February, 1890.

The action was brought to recover damages for the alleged discriminations exercised by the defendant in the transportation of coal over its line, as between the plaintiffs and certain other shippers of coal upon the defendant's railroad. To the complaint in this action the defendant interposed a demurrer on the ground, first, that the court had no jurisdiction of the subject-matter of the action; and, second, that the complaint did not state facts sufficient to constitute a cause of action.

Benjamin S. Harmon, for the appellants.

Benjamin H. Bristow and *Charles Steele*, for the respondent.

DANIELS, J.:

It appears from the complaint that the plaintiffs, as copartners, were miners, shippers and dealers in coal from the 1st of May, 1885, until September, 1889, when this action was commenced. The mines from which their coal was obtained were located in the region of the Carbondale, Lackawanna and Wyoming anthracite coal fields, in the State of Pennsylvania. During the same time it is also alleged the defendant was and continues to be a corporation created under the laws of the State of New York, and engaged as a common carrier in the transportation of passengers and freight over its different lines, and those controlled by it, including a main line from Jersey City, in the State of New Jersey, to Buffalo and Dunkirk, in the State of New York, and a branch line from Carbondale, in the State of Pennsylvania, to a junction with the main line at Susquehanna in that State. It is also alleged that the plaintiffs' business in part consisted in shipping their coal for sale to the markets north-east and west, reached by the defendant's lines, and that the defendant's lines of railway and its connections supplied the only means of shipment for the plaintiffs' coal to these markets. It is then stated that the Delaware and Hudson Canal Company and the Hillside Coal and Iron Company, two other corporations, were mining coal in the same region during the same time and shipping it to the same general markets and by the same route as that employed and those reached by the plaintiffs. And that the Delaware and Hudson Canal Company mined and carried coal from its own collieries in the same region, and shipped the same over the

lines of road under its ownership and control, and as a common carrier. And that the other company was a nominal organization, devised and maintained by the defendant to provide the means, without detection, of exercising unjust and unlawful discriminations against the plaintiffs and other individual coal operators.

The plaintiffs then aver that during this period of time they mined, or bought at the mines in the region which has been mentioned, 778,753 tons, more or less, of anthracite coal and shipped it over the lines of the defendant from Carbondale to the markets north, east and west reached by the defendant's lines and connections previously mentioned. That during these times the defendant, directly or indirectly, allowed to these other companies certain concessions and draw-backs upon the public rates or prices fixed by it for the transportation of anthracite coal over its lines, which it failed and refused to allow to the plaintiffs, and by reason thereof the rates and sums demanded and received by the defendant from the plaintiffs for the transportation of their coal exceeded the rates or sums charged, demanded and received by it from these other companies for the like service from the same place, upon like conditions, and under similar circumstances, to the amount of sixty cents a ton upon all the anthracite coal shipped over the defendant's lines during the time which has been mentioned, whereby they have been injured and damaged in the sum of \$506,189.45. It is then added that these discriminations were made under, controlled by, and in violation of an act of the State of Pennsylvania, approved on the 4th of June, 1883, providing as follows:

"Section 1. That any undue or unreasonable discrimination by any railroad company or other common carrier, or any officer, superintendent, manager or agent thereof, in charges for or in facilities for transportation of freight within this State, or coming from or going to any other State, is hereby declared to be unlawful.

"Section 2. No railroad company or other common carrier engaged in the transportation of property, shall charge, demand or receive from any person, company or corporation, for the transportation of property or for any other service, a greater sum than it shall charge or receive from any other person, company or corporation for a like service, from the same place, upon like conditions and under similar circumstances, and all concessions in rates and draw-

backs shall be allowed to all persons, companies or corporations alike, for such transportations and service, upon like conditions, and under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals or between individuals and transportation companies, in the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered."

And concluding that by reason of the premises the defendant had become liable to the plaintiffs for damages treble the amount of the injuries suffered by them, being the sum of \$1,518,588.35.

The second cause of action is alleged to have arisen under the same attendant facts by furnishing box and stock cars, for the shipment of the plaintiff's coal, which they were obliged, at their own expense, to furnish lumber for, and do work in fitting and cleaning and putting them in a suitable condition to carry their coal, while the defendant furnished the cars to these other companies and shippers without expense to them in the condition suitable for receiving their coal, and thereby discriminated to the extent of one dollar for each car, amounting to \$26,381 against the plaintiffs. The allegations before made concerning the statute of Pennsylvania are then repeated, followed by the averment that the defendant, by this discrimination, had become liable to the plaintiffs for damages treble the amount of the injuries suffered, and being the sum of \$79,143.

A third cause of action is presented by a reiteration of the same introductory facts, caused by a violation of the defendant's duty in the apportionment of its cars between the plaintiffs and these other shippers, when its cars were deficient in number to take all the coal offered for transportation, by themselves and these two other shippers, and by giving preference to the latter. By this discrimination it is alleged that the plaintiffs were obliged to close their mines, or run them on reduced time, thereby increasing the cost of the production of their coal to the extent of twenty cents a ton upon all the anthracite coal mined at the collieries and shipped over the defendant's lines, and causing injury and damage to the plaintiffs amounting to \$155,750.60. The same references are then made to the statute

and the same liability for treble damages repeated which are stated at the sum for this cause of \$467,251.80.

Like causes of action are in the same form set forth and alleged to have accrued to the plaintiff Andrew Langdon, between the 1st of August, 1883, and the 1st of May, 1885, for which treble damages are stated to have accrued in his favor, and to have been assigned by him to the plaintiffs. And for all the damages at this rate accruing the judgment has been demanded.

The defendant demurred to this complaint, assigning as causes of demurrer, the failure to state facts presenting a cause of action, and the absence of jurisdiction of this court over the action.

The object of the complaint throughout has been to place the case made within the statute of the State of Pennsylvania. That intention is disclosed by closely following the verbiage of the act, in stating the obligations created and the wrongs suffered from the acts of the defendant by the plaintiffs and their assignor. Important facts, it is true, are alleged, which would form material grounds for an action at common law for withholding from the plaintiffs and the assignor that equality of right which they were entitled to enjoy with these other patrons of the defendant. But these facts have not been set forth to present any cause of action for damages suffered by the violation of that common-law equality, but as essential, and only so far as they are essential, to place the case within the restraints and remedies of this statute. The concessions and rebates which were given to the other shippers and denied to the plaintiffs and the assignor, the obligation to clean the cars and the work of putting them in a suitable condition for the carriage of coal before they could be used, and the omission and failure to allot to them their fair proportion of cars, when the supply was deficient, are all brought forward in such language as to directly apply the statute and to entitle the plaintiffs to its own express measure of relief. Not only that, but the express averment has been made as to each cause of complaint, that it arose from an undue and unreasonable discrimination, made under and controlled by, and in violation of this statute of the State of Pennsylvania; no plainer or more distinct effort could be made than has been in this instance to place the right of recovery wholly within and upon the statute. And that has led to the omission of other and different

backs shall be allowed to all persons, companies or corporations alike, for such transportations and service, upon like conditions, and under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals or between individuals and transportation companies, in the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered."

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averments of facts required for the creation of a right of action at common law.

That causes of action within the statute have been alleged is reasonably free from all ground of controversy. But that alone, while it would maintain the action in the State of Pennsylvania, will not entitle the plaintiffs to succeed in the courts of this State, if the redress prescribed by the statute must be held to be penal in its nature, for the principle seems to be quite well settled that the courts of one State will not enforce the penal laws of another State. Upon the existence of this principle there is no disagreement in the authorities. But numerous disagreements have arisen in the definition of what are to be regarded or held to be penalties.

In this State the liability created by statute for the payment of a debt not owing by the defendant, but for the omission of an act or report required from him as a corporate officer, has uniformly been held to be a penalty. (*Merchants' Bk. v. Bliss*, 35 N. Y., 412; *Rector, etc., v. Vanderbilt*, 98 id., 170; *Gadsden v. Woodward*, 103 id., 242; *Whitaker v. Masterton*, 106 id., 277; *Roediger v. Simmons*, 14 Abb. [N. S.], 256.) And this construction of the law has also been maintained in other States. (*Lebanon Bank v. Karmany*, 98 Penn., 65, 75; *Halsey v. McLean*, 12 Allen, 438; *Breitung v. Lindauer*, 37 Mich., 217; *Steam Engine Co. v. Hubbard*, 101 U. S., 188.) As to this being the effect of the law, the decided cases are quite uniform. But they are not so much so upon the question of the enforcement of the liability in the courts of another State than that by whose laws it has been created. The propriety of the rule, so far as it has been adopted, has been partially, at least, conceded, owing to the circumstance that no preceding liability existed in these cases against the defendant for the debt or demand itself. But that which the statute declared was wholly by way of punishment for the violation or neglect of a statutory duty. But while this has been a fundamental fact in that class of cases the same principle has also been applied to the redress of an injury to the rights of the party entitled to recover enhanced damages or amounts on account of a wrong suffered by himself. In *Blaine v. Curtis* (59 Vt., 120), the principle was applied to an action for the recovery of three times the excess of usurious interest reserved and taken in the State of New Hampshire, in violation of a statute of that State, and which was held

incapable of being maintained in the State of Vermont. In *Newcomb v. Butterfield* (8 Johns., 343), it was held to include treble damages for a trespass on public lands; and in *Strong v. Stebbins* (5 Cow., 210; *Warren v. Doolittle*, id., 678), to be applicable to a person assisting in the removal of a tenant's property from demised premises, depriving the landlord of his distress for non-payment of rent. And *Cohn v. Neeves* (40 Wis., 393) conforms to this rule.

Copious references have been made in the brief of the plaintiffs' counsel to other cases bearing on this part of the present controversy. And they are far from being uniform in the application of the principle, as will be seen from *United States v. Chouteau* (102 U. S., 603); *Reed v. Northfield* (13 Pick., 94); *Le Forest v. Tolman* (117 Mass., 109); *Quimby v. Carter* (20 Me., 218); *Stockwell v. United States* (13 Wall., 531).

In this diversity of judgment the only safe and sure criterion is that of the scope and language of the statute itself. If it has been so enacted as to provide a punishment, as distinguished from an indemnity, then it should certainly be held to impose a penalty. This statute has been so framed as to regulate the entire subject included in the action. It has declared the acts complained of to be unlawful, and the consequences which will follow their performance. It has not provided for any recovery of mere damages for its violation, but a gross sum has been prescribed as the amount of the recovery. It is indivisible, except in ascertaining the amount, which is to be treble the sum of the actual injury or damage. The utmost extent to which the courts have gone in distinguishing between an indemnity and a punishment fails to include this act. For its object is to prescribe punishment for the violation of its provisions. And it is no less a punishment by reason of the fact that the amounts which are payable are to be recovered by the injured party. By the complaint a case has been stated requiring this punishment to be imposed, and nothing less than that has been demanded by the plaintiffs. It is the penalty, and that alone, which is designed to be enforced. That is the entire theory of the action, and it has in each subdivision of the complaint been prominently set forth as well as in the final demand made. And in this manner the action has been unmistakably defined as one for the recovery of the penalties created

by the statute. To hold it to be otherwise would be a direct departure from the action as it has been framed and presented. And the cases of *Conaughty v. Nicholls* (42 N. Y., 83) and *Williams v. Freeman* (12 Civ. Pro., 334) do not sanction such a departure. But those of *Kelly v. Downing* (42 N. Y., 71), requiring special stress to be placed on the demand for judgment when a demurrer to the complaint has been served, and *Arnold v. Angell* (62 N. Y., 508), *Hollister v. Englehart* (11 Hun, 446) and *Grover v. Morris* (73 N. Y., 473, 479) maintain the principle that the theory of the action, as the pleadings disclose it, should ordinarily be followed. The plaintiffs themselves have given their action the restricted nature which it has as a suit for penalties. As such this court cannot entertain it, for the reason that it is to carry into effect the penal law of another State. (*Wisconsin v. Pelican Ins. Co.*, 127 U. S., 265; *Western T. and Co. v. Kilderhouse*, 87 N. Y., 435.) Indeed, this proposition has been practically conceded by the plaintiffs. That they have been seriously injured by the discriminations of the defendant, and are entitled to redress, is free from doubt as the facts now appear. But that redress must be sought through the courts of the State whose laws in this manner have been violated.

The judgment should be affirmed, with costs; but, as the complaint may yet be amended so as to present causes of action at common law, the plaintiffs should be allowed to amend in twenty days on payment of the costs of the demurrer.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment affirmed, with costs; plaintiffs to be allowed to amend in twenty days on payment of costs.

CAROLINE LIVINGSTON, APPELLANT, v. THE NEW YORK
ELEVATED RAILROAD COMPANY AND THE MAN-
HATTAN RAILWAY COMPANY, RESPONDENTS.

Service of a notice on an attorney through a slot in his office door.

The service of a notice of appeal was attempted to be made upon the adverse attorney by sliding the same through a slot in the center of his office door, which was surmounted with a brass plate with the word "Letters" upon it. The notice was not inclosed in a sealed wrapper directed to the attorney.

Held, that the service was ineffectual.

Duval v. Busch (18 Civ. Pro. R., 866) disapproved.

In order that a service may be made, under the provision authorizing the leaving of the paper in a conspicuous place in the office, it is necessary that access to the office should have been first attained, and where the office is closed the service must be made by depositing the paper in a sealed wrapper, directed to the attorney, in his office letter-box, or at his place of residence, by leaving it with a person of suitable age and discretion, or by a service upon the attorney himself personally.

APPEAL by the plaintiff from an order, entered in the office of the clerk of the county of New York on the 2d day of July, 1890, permitting the defendants in the above-entitled action to file with the clerk of the Supreme Court, *nunc pro tunc*, as of the 7th day of June, 1890, a notice of appeal from a judgment entered in said action on the 8th day of May, 1890.

S. B. Livingston, for the appellant.

Davies & Rapallo, for the respondents.

DANIELS, J. :

The power to make the order from which the appeal has been taken depends upon the fact whether a legal service of the notice of appeal was made upon the attorney for the plaintiff on the 7th of June, 1890. For if no such service took place on that day, then the court had no power to permit this service of the notice to be made upon the county clerk.

To prove that the notice was legally served upon the plaintiff's attorney, it was shown that a person employed in the office of the defendant's attorneys repaired with the notice of appeal to the office of the plaintiff's attorney on the afternoon of the 7th of June, 1890,

intending there to make service of the notice. When he reached the office the door was locked and he was unable to enter it to make service of the notice. But a slot was in the center of the door, surmounted with a brass plate with the word "Letters" upon it, and the notice was slid through this slot into the office, and that is the only service which was made, or attempted to be made, upon the attorney for the plaintiff of the notice of appeal; and whether this was a legal service of the notice depends upon the construction to be placed upon subdivision 3 of section 797 of the Code of Civil Procedure. That subdivision is the same, so far as it affects this service, as the rule previously existing, declaratory of the manner in which legal papers should be served, and under that rule it was held that this service could only be made by leaving the paper served in a conspicuous place in the attorney's office when the office door was unlocked (*Anon.*, 18 Wend., 578), and this decision has been followed in other cases where access has been obtained to the office without the consent of the attorney after the door had been closed and locked. (*Campbell v. Spencer*, 1 How. Pr., 199; *Livingston v. McIntyre*, Id., 253; *Vail v. Lane*, 4 Hun, 653.) These authorities all indicate the proper construction of the language of the subdivision to be, that the office must be left by the attorney in such a condition that a person may enter it and leave the paper to be served in a conspicuous place in the office, regularly to make that service. And the language of the subdivision indicates that to have been the intention of the legislature in making the enactment, for it has merely provided that service of a paper may be made when it shall be left in the office of the attorney, between six o'clock in the morning and nine o'clock in the evening, by leaving it in a conspicuous place in the office. It has also provided for depositing the paper in a sealed wrapper, directed to the attorney in his office letter-box, where one may have been provided. But no service under this part of the subdivision was intended or attempted. What it was intended to do was to leave the notice of appeal in a conspicuous place in the office of the plaintiff's attorney. But, inasmuch as the office was locked at the time, it was not so made, for no entry could be made into the office to make that service. That it was intended by the subdivision that it could only be made in this manner by entering the office is still more evident from the concluding portion of the

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subdivision, for that has provided, further, that if the office is not open so as to admit of leaving the paper therein, then the service is to be made, where that shall not be done by means of the letter-box, by leaving the paper to be served at the residence of the attorney with a person of suitable age and discretion. This latter clause still more clearly restricts the service where it may be made by leaving the paper in a conspicuous place in the office, to a case where the office itself shall be found open. If it is not open so as to admit of such service, and no service is made by depositing the paper as directed by the section, in a sealed wrapper, directed to the attorney in his office letter-box, then it must be made either upon himself personally or at his place of residence with a person of suitable age and discretion.

The service of a notice of appeal not only forms no exception to this requirement, but it has been provided by section 1300 of the Code of Civil Procedure that it may be served in this manner; and such a service of it has not been made.

It is true that it was held in *Duval v. Busch* (13 Civ. Pro., 366), by the Special Term of the City Court, that such a service as was made in this instance, would be regular. But this decision is opposed to the clear import of the language used in the subdivision, and also to the current of authorities, by which it had been previously construed.

The attorney for the plaintiff did not accept this service, but returned the notice of appeal to the attorneys for the defendant, who in return sent the same to him again as having been regularly served on the 7th of June, 1890. He at no time acquiesced in, but resisted, the service, as irregular and unauthorized. And such appears to have been the character of this service.

There was, accordingly, no authority which permitted the notice of appeal to be afterwards served upon the clerk for the completion of the appeal, and the order should be reversed, with ten dollars costs and the disbursements.

VAN BRUNT, P. J., and BRADY, J., concurred.

Order reversed, with ten dollars costs and disbursements.

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MICHAEL SNOW, RESPONDENT, v. THE RUSSEL COE
FERTILIZER COMPANY.

ROBERT C. DAVIDGE, APPELLANT.

Agreement by the president of a corporation to postpone the enforcement of his claim against it — not enforceable by a receiver — consideration.

An agreement made by a creditor, the president and largest stockholder of a corporation, with a firm to which such corporation was also indebted, "in consideration of said firm's not pressing their claim to compulsory collection," that such president and stockholder would not enforce a claim existing in his favor for a balance of salary due him until after the other creditors of the corporation should have been fully paid, is not enforceable by a receiver, subsequently appointed, of the assets of such corporation, nor has the receiver a right in such a case to defer any payment to the president of the balance due him for salary until the claims of all other persons, creditors of such corporation, shall have been paid.

Lawrence v. Fox (20 N. Y., 268) distinguished.

Such agreement on the part of the president of the corporation is not enforceable by the receiver thereof, as the representative of the company or of its stockholders, nor as the representative of the particular firm, the creditor of the corporation making such agreement with its president. (BARRETT, J., dissenting.)

Semble, that such agreement must be enforced, if at all, by the creditor of the corporation with whom it has been made, and not by the receiver thereof for the benefit of such creditor.

In such a case the agreement is too vague and indefinite for enforcement, as the firm creditor does not bind itself to refrain from proceeding against the company for any given period of time, nor is the period of forbearance by the president for the enforcement of his salary stipulated, and there is, therefore, neither a valid consideration nor mutuality.

APPEAL by Robert C. Davidge from so much of an order made in the above-entitled action, April 27, 1889, and entered in the office of the clerk of the county of New York on May 15, 1889, as ordered that the receiver of the Russel Coe Fertilizer Company, upon his accounting and distribution of the assets of said company among its creditors, pay the amounts of the claims of all its creditors, excepting the claim of said Davidge, in full, or so much thereof as said assets would pay, and that the claim of said Davidge be paid only after all other claims against said company shall have been paid, and out of the residue of said assets, and from every part

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of said order which postponed the claim of said Davidge, to the claims of other creditors of said company.

The order appealed from was made upon the report of a referee appointed by the court to take testimony and report concerning the dispute between the receiver of the defendant, the Russel Coe Fertilizer Company and Robert C. Davidge, touching claims of said Davidge against said company.

The referee found, among other things in his report, that the said Robert C. Davidge was president and general manager of the Russel Coe Fertilizer Company, and as such had agreed with the trustees thereof that he should receive a salary for his services at the rate of \$4,000 a year; that he had acted as president and general manager of the company from about the 24th day of January, 1885, to August 25, 1886, and had drawn during said period from said company at different times various sums of money, which paid his salary up to January 1, 1886; that on or about the 25th day of August, 1886, the plaintiff Michael Snow was appointed receiver of the Russel Coe Fertilizer Company, and that the said Davidge had not been paid for the services he had rendered to the Russel Coe Fertilizer Company from January 1, 1886, to August 25, 1886, which, at the rate above mentioned, would amount to the sum of \$1,945.87; and that said Davidge's services to the defendant's company were fairly and reasonably worth the sum of \$4,000 per annum. The referee further found as follows:

VII. That George H. Nichols & Co. were creditors of the defendant and were pressing the company for the payment of their claims, and in the month of July, 1885, said Davidge, the defendant's president as aforesaid and its principal stockholder, agreed with said Nichols & Co. not to draw nor receive any salary from the defendant during the company's period of liquidation, in consideration of said firm's not pressing their claim to compulsory collection; that said Nichols & Co. complied with said agreement, did not sue the defendant nor collect their demands, and are now creditors of the company.

In my opinion, on the evidence taken by me pursuant to said order, Robert C. Davidge has established no valid claim against the defendant in the matter submitted to me, and is not a creditor of the said, the Russel Coe Fertilizer Company.

which was made in July, 1885, between Mr. Davidge, the president of the corporation, and Messrs. George H. Nichols & Co., who were creditors of the Russel Coe Fertilizer Company. The firm were pressing the corporation for the payment of their claims. Mr. Davidge, the president and largest stockholder, agreed with the firm not to draw or receive any salary from the company while its affairs were being liquidated, "in consideration of said firm's not pressing their claim to compulsory collection."

George H. Nichols & Co. fulfilled their part of the agreement and did not sue the company and have not collected their demands, but still remain creditors of the corporation. The effect of this agreement, as held by the court below, was to defer any right on the part of Mr. Davidge to enforce his claim until after the payment of all other persons having claims against the corporation.

As the receiver has not appealed from any portion of the order of the Special Term, he is not in a position to attack that part of the decision which adjudges Mr. Davidge to be a creditor of the defendant. The only question which is now presented for consideration is that which arises upon Mr. Davidge's appeal, to wit, whether it was proper to postpone the payment of his claim for salary as president and general manager of the Russel Coe Fertilizer Company until all other claims against the company should have been satisfied.

The theory of the respondent is that the case is governed by the doctrine of *Lawrence v. Fox* (20 N. Y., 268), as that doctrine has been modified by later decisions. According to this view, the receiver, as the representative of the corporation, is entitled to enforce for its benefit the promise made by Mr. Davidge to Messrs. George H. Nichols & Co., that he would not draw any salary during the period of liquidation. The learned counsel for the respondent concedes that, to render the promise thus enforceable, however, it must appear either that some obligation or duty existed on the part of the promisee toward the third party, that is, on the part of Messrs. George H. Nichols & Co., toward the Russel Coe Fertilizer Company, or that the promisee intended that some benefit should result to the third party from the promise, that is to say, there must have been an intent by Messrs. George H. Nichols & Co. to secure some benefit to the corporation. In the case of

Vrooman v. Turner (69 N. Y., 280, 284), Judge ALLEN declares that both the obligation and intent must exist in order to give a third party a right of action on the promise. In the case at bar, however, I am unable to discover either. Certainly, the firm of George H. Nichols & Co., owed no duty to the Russel Coe Fertilizer Company, and were under no obligation to it. The duty and obligation were entirely on the other side. The firm were simply creditors of the corporation. Nor can I find anything to indicate an intention on their part to benefit the company by getting Mr. Davidge to promise not to draw any salary. Their sole purpose would seem rather to have been to benefit themselves, by thus increasing the amount applicable to the payment of their own claim; but it is difficult to see how this arrangement could do the company any good if it still remained liable to pay Mr. Davidge's salary afterward, as the court below has held that it did.

For these reasons I do not think the promise of Mr. Davidge is enforceable by the receiver as the representative of the company or its stockholders. There is no difficulty in the way of its enforcement by him, however, to a certain extent, as the representative of the creditors of the corporation. The promise was made, not for the benefit of the creditors generally, but for the particular benefit of particular creditors, Messrs George H. Nichols & Co. The receiver represents these creditors, and it is his duty to protect their rights. They have the right to priority in payment over Mr. Davidge. They abstained from pressing their claims to a compulsory collection in consideration of his promise not to draw any salary during the period of liquidation, and he is estopped from enforcing any claim for such salary which will operate to lessen the amount receivable by them. In other words, the appellant's claim for salary must be postponed to the claim of Messrs. George H. Nichols & Co., but not to the claims of the other creditors of the Russell Coe Fertilizer Company.

This result can be brought about by paying Messrs. George H. Nichols & Co. just what they would receive if the appellant's claim of \$1,945.87 were not considered as a claim against the assets in the hands of the receiver. After this has been done the appellant will be entitled to his ratable dividend like the other creditors.

The order appealed from should be modified in accordance with

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the views which have been expressed, without costs to either party on this appeal.

Order reversed and the receiver directed to admit Davidge's claim to the extent of \$1,945.87 as valid, and to pay it *pro rata* with the other claims against the company.

ARCHIBALD C. HAYNES, RESPONDENT, v. J. BLAKELEY
CREIGHTON, APPELLANT.

Examination of a party before trial — when proper to enable plaintiff to frame his complaint.

In an action brought to recover the amount due upon a promissory note made by the defendant, payable to his own order and indorsed by him, an application was made by the defendant for an order authorizing an examination of the plaintiff in order to enable the defendant to obtain information necessary for use in the framing of his answer. The information desired by the defendant related to the transfer of the note to the plaintiff, in regard to which the defendant's affidavit stated that he was not only ignorant, but that the knowledge of such facts could only be obtained from the plaintiff, and that such knowledge was necessary to enable the defendant to frame and serve his answer.

An order was made directing the examination to include answers to such questions as should be put to the plaintiff touching the alleged transfer of the note to him, the date of the transfer, the parties to it, the consideration thereof, and such other matters as might be relevant or material thereto. It was restricted to the facts known to the plaintiff, and necessary for the information of the defendant in answering the complaint.

Held, that the order was properly made.

That it was not an answer to the application, that the defendant might examine the plaintiff as a witness upon the trial, for such examination would be restricted to the issue made by the pleadings, while the application in question was for an examination necessary to enable the defendant to make the issues as broad as the facts would warrant.

APPEAL by the defendant J. Blakeley Creighton from an order of the Supreme Court, made in the above-entitled action and entered in the office of the clerk of the county of New York on the 25th day of June, 1890.

The order appealed from vacated an order theretofore made in the action for the examination of the plaintiff, and set the same

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aside, with ten dollars costs to the plaintiff. The order so set aside directed the plaintiff to appear before a justice of the Supreme Court, at chambers, at a time therein specified, to "answer such questions as shall be put to him touching the alleged transfer to him of the alleged promissory note in suit, the parties to such transfer aforesaid, the date of such transfer aforesaid, and the consideration or considerations, if any therefor, and touching such other matters as may be relevant or material thereto."

William Man, for the appellant.

Root & Clarke, for the respondent.

DANIELS, J.:

This action is upon a promissory note made by the defendant, payable to his own order, and indorsed by him, for the sum of \$4,500, and due in five months from its date. This note was shown to have been one of a series in the same form amounting to the sum of \$16,500. They were made and indorsed to replace bonds and stock delivered to Charles T. Russell, of Pittsburgh, upon what was represented to be a loan of that sum of money obtained from him for a company in which the defendant was the owner of both stock and mortgage bonds. The notes were delivered to A. D. Jones, the treasurer of the company, to be used for that object. But he used no more than \$6,000 in amount in that manner. The residue he misappropriated and used for his own benefit, and the note in suit is one of this residue.

The defendant applied for and obtained an order for the examination of the plaintiff to enable him to obtain such information as was necessary to frame his answer. As to the making, indorsement and diversion of the note no examination of the plaintiff was necessary, for these were facts within the knowledge of the defendant. But what the defendant desired to ascertain was information of the facts attending the transfer of the note to the plaintiff. Of those facts his affidavit not only showed him to be ignorant, but also that a knowledge of them could only be obtained from the plaintiff, and that such knowledge was necessary for him to frame and serve his answer. And the order which was made directed the examination to include answers to such questions as should be put to the plaintiff,

touching the alleged transfer of the note to him, the date of the transfer, the parties to it, the consideration therefor, and such other matters as might be relevant or material thereto. It was restricted to the facts known to the plaintiff, and unknown to, and necessary for the information of, the defendant in answering the complaint. If the note had been transferred to the plaintiff under circumstances rendering him incapable of recovering upon it, and which it was necessary should be alleged by way of answer to entitle the defendant to make proof of them on the trial, he was entitled to that information from the plaintiff, and it could be obtained only by his examination. The consideration paid or allowed may have been such as to render the transfer usurious. But that could only become known in this manner. And without alleging it in the answer the defendant would not be permitted to prove it even by the plaintiff himself upon the trial. And that of itself was sufficient to authorize this examination. The defendant had been defrauded by his own agent, and he was entitled to avail himself of all such methods of redress as the law had provided for his protection. And this was one of them, by which he could be placed in the position requisite for the intelligent presentation of any defenses arising out of facts unknown to him, and which were necessarily within the knowledge of the plaintiff. It does not answer the application that the defendant may examine the plaintiff as a witness upon the trial. For that examination would then be restricted to the issue. What is necessary for him is to make the issue as broad as the facts will warrant it, and then he will be entitled to introduce whatever proof may be within his power and necessary for his own protection.

The affidavit has fully complied with all that can be required under the rules referred to in *Spero v. West Side Bank* (27 N. Y. State Rep., 29). And as the essential information can be obtained by the defendant in no other way, he is entitled to this examination of the plaintiff. It has been said in the points that the defendant has, since the order was made, served his answer. But if such is the fact, it cannot be here considered, for it was not before the court when this order was made. Neither is it stated that the answer served includes the defenses expected to be made as the result of the examination of the plaintiff.

The order should be reversed, with ten dollars costs and the

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disbursements, and the motion to vacate the order for the examination of the plaintiff denied.

VAN BRUNT, P. J., and BRADY, J., concurred.

Order reversed, with ten dollars costs and disbursements and the motion to vacate the order for the examination of the plaintiff denied.

BENJAMIN F. SHERMAN, RESPONDENT, v. THE BEACON
CONSTRUCTION COMPANY (LIMITED), APPELLANT.

Examination of a party before trial, to enable the plaintiff to amend his complaint — it will not be ordered unless the party be first applied to, to furnish the information voluntarily.

By an affidavit, made in proceedings to obtain the examination of one Addicks in order to enable the plaintiff to obtain facts necessary for use in the preparation of his complaint, it appeared that the action was brought to enforce an agreement alleged to have been made by the defendant to pay the plaintiff, as compensation for his services, a percentage of ten per cent upon the profits of certain contracts made by the defendant; that judgment was sought for the payment of such amount; that no complaint had been served; that the agreement was not denied by the defendant; that the said Addicks was chairman of the defendant and familiar with all its transactions; that he resided in the city of Boston, but came from time to time to New York city on business of the company, which had at the time, or until recently, an office in said city; that the testimony of said Addicks was material and necessary to enable plaintiff to prepare his complaint, as he had no knowledge as to what contracts embraced within said agreement had been closed, and what the profits thereof were, etc.

It was objected, that the affidavit did not show that the plaintiff had ever made any application at the office of the company, or to any person connected with it, for the desired information.

Held, that the objection was well taken.

That no person should be subjected to a compulsory examination on an application of this kind, unless it appeared that an application had been made to the company for the information desired, followed by a refusal to give it, or that an imperfect response had been made to the application.

That while parties might not be bound to go out of the State for the purpose of applying for such information, yet as it appeared in this case that Addicks occasionally came to the city of New York on business, and as such information might be obtained by a letter properly addressed to the company, the order for the examination of Addicks should not be granted until such efforts to obtain the information had been made.

APPEAL by the defendant, the Beacon Construction Company (Limited), from an order of the Supreme Court, entered in the office of the clerk of the county of New York on the 25th day of July, 1890, denying defendant's motion to vacate and set aside an order of this court, bearing date the 14th day of May, 1890, directing J Edward Addicks to appear before George B Newell, Esq., as referee, and submit to an examination concerning the matters referred to in the affidavit upon which such order was made.

Cary & Whitridge, for the appellant.

George Bliss for the respondent.

BRADY, J.:

The defendant is a foreign corporation and the person sought to be examined is its chairman. The affidavit upon which the order was made, so far as it relates to the merits of the motion, is as follows: That the action is brought to enforce *an agreement* made by defendant to pay to plaintiff, as compensation for services, a percentage of ten per cent upon the profits of certain contracts made by defendant, and judgment is demanded for the payment of the amount; that no complaint has yet been served, but that the contract is not, as deponent believes, denied by defendant; that J. Edward Addicks is the chairman of the defendant, and the person familiar with all its transactions and who controls it; that he resides in the city of Boston, but comes from time to time to the city of New York on business of the company, which has, or had till recently, an office at No. 120 *Broadway*, New York city; that the testimony of said Addicks is material and necessary for deponent to enable the complaint to be prepared, inasmuch as deponent has no knowledge as to what contracts embraced in said agreement with him have been closed, and what the *profits* are, though he has been informed by officers of defendant that *some contracts* have been closed and *large profits* have been earned, and that he cannot obtain such information except from the examination of some officer of defendant, as the books *are not within this State*; that no officer of defendant resides in the State, and that, with the exception of said Addicks, no officer of defendant who is in a position to furnish the necessary information comes habitually, or is likely to be within

this State, but that said Addicks possesses and can furnish the necessary information.

Several objections were taken to the sufficiency of this affidavit which are set out *seriatim*, but, nevertheless, as these motions are *sui generis*, and each must, therefore, be determined on its own merits, it will not be necessary to refer to the numerous authorities bearing upon the question of the sufficiency of an affidavit made for the purpose of obtaining an order for the examination of a party before trial and for the purpose of framing a complaint. The affidavit recited is subject to the criticism of indefiniteness, but, nevertheless, it is quite as comprehensive as that presented for the consideration of the court in *Glenney v. Stedwell* (64 N. Y., 120). Indeed, it so closely resembles it that it may be said to be based upon its form and substance. But the objection taken here, and which was not presented in the case just referred to (and could not well be, as the defendant was not a company), is that the affidavit fails to show that the examination of Addicks is necessary to enable the plaintiff to prepare his complaint; and it is founded upon the proposition that there is no evidence that the plaintiff has ever made any application at the office of the company, or to any person connected with it, for the desired information. It is not contended, on the part of the respondent, that it is not necessary to show, on such an application as this, that the examination of the person sought is necessary to enable the plaintiff to prepare a complaint.

It cannot be said either, as has been said in some cases, that the affidavit does not specify a single fact or circumstance showing the necessity for the examination of Mr. Addicks to prepare the complaint, inasmuch as it alleges, as we have seen, that the right of the plaintiff to recover, and the extent of the recovery, depend upon the closing of certain contracts, in which, by the agreement, he had an interest, and as to which he has no information, except that the contracts, or some of them, have been closed. His case is, substantially and briefly stated, that he made a contract with the defendant by which it was agreed, for services rendered, to pay him a percentage upon the profits of certain other contracts made by the defendant, some of which have been closed, but which of them he is not able to state, and that Mr. Addicks, being familiar with

all the transactions of the defendant, and controlling them, his examination is material and necessary to enable the plaintiff to get the information desired.

The point seems to be well taken, however, that no person should be subjected to a compulsory examination in an application such as this, unless it appear that an application was made to the company for the information desired, followed by a refusal to give it, or that there was an imperfect response made to the application.

It is true it has been held that, under circumstances such as those disclosed by the affidavit, parties are not bound to go out of the State for the purpose of getting information, but that will not be necessary in this case, because the affidavit shows that Mr. Addicks, who, as we have seen, is chairman of the defendant and occasionally comes to New York on business, has an office here which is, or recently was, at 120 Broadway; beside which it could be obtained by letter properly addressed to the company, or refused. In the absence of this ceremony it seems to be incorrectly asserted that the examination of the person is material and necessary for the purpose of framing the complaint.

The learned counsel for the respondent has taken the point that this is not an appealable order, and rests that proposition upon certain cases; but they do not relate to such an application as this, and are not, therefore, applicable.

The appellant may be said to be aggrieved by any order which affects its standing in court in any way, although it involves only the development of such information as may be possessed by one of its officers.

For these reasons the order appealed from should be reversed, with costs, and without prejudice to the right of the plaintiff to renew this proceeding after application made for the information desired.

VAN BRUNT, P. J., concurred; DANIELS, J., concurred in the result.

Order reversed, with costs, but without prejudice to plaintiff to renew proceeding after application made for the information desired.

WILLIAM H. WESTERVELT AND OTHERS, RESPONDENTS, v.
AGRUMARIA SICULA, SOCIETA ANONIMA DI TRANS-
PORTI MARITTIMI, APPELLANT.

Affidavit on an application for an attachment—must set forth facts showing that damages have been sustained, and the facts establishing their amount.

The affidavit upon which an application for an attachment is founded, where the damages are unliquidated, must set forth the facts which establish the damages, as the amount of damages must be shown in order to entitle the plaintiff to an attachment.

Such affidavit must also allege, not simply the conclusion that the plaintiff has suffered damage by reason of the breach of contract set forth to an amount specified, but must state the facts from which such conclusion may properly be drawn.

APPEAL by the defendant from an order made at Special Term, and entered in the office of the clerk of the county of New York on September 25, 1890, denying the defendant's motion to vacate a warrant of attachment theretofore granted in the above-entitled action on August 7, 1890.

The affidavit upon which the warrant of attachment was issued alleged that the firm, of which the plaintiffs were members, were large importers of Italian green fruits from Sicily; that defendant was a foreign corporation, transacting its principal business at the city of Palermo, Sicily; that the plaintiffs' firm was appointed the American agent of such corporation, and were to receive for services, as consignees of the said corporation, first, two and one-half per cent on freight to be collected on boxes of fruit; second, two per cent on general merchandise; third, one per cent on sulphur and other minerals, of which commissions a certain percentage specified in the affidavit was to be returned to the directors of the corporation at Palermo; that said appointment was accepted by the firm, and the agreement in respect thereto was fully performed by it, and that services were rendered under such agreement.

The affidavit further stated as follows: "We have duly demanded of the defendant, through Angelo Tagliavia, our agent in Palermo, the carrying out of their contract of agency with us, or at least the payment to us of commissions earned, and of such return commis-

sions as are due us as consignees of fruit. Our damages through the absolute refusal of the defendant thus to pay us, and through the summary breach of their contract with us, amounts to \$5,000. Said Hirzel, Feltmann & Co. have also refused to account to us for our said commissions, or for any sum whatever, which said firm has been collecting for us. My firm is entitled to recover said sum of \$5,000 from defendant, over and above all counter-claims known to me or my said firm."

J. W. McElhinney, for the appellant.

F. W. Hinrichs, for the respondents.

VAN BRUNT, P. J.:

We think that the motion should have been granted. There are no facts set up in the affidavits upon which the attachment was granted from which the court can judge what amount, if any, of damages have been sustained by the plaintiffs. In an action upon contract for the payment of a sum certain, it appears from the contract itself what the damages will be. In an action, however, for unliquidated damages it depends upon the facts of the case as to whether the plaintiff has sustained merely nominal or real damage. A cause of action may be completely set forth where only nominal damages can be recovered, and, therefore, in an affidavit upon which to found an application for an attachment, where the damages are unliquidated, it is necessary for the plaintiff to set out the facts which he claims proves his damages, in order that the court may judge as to whether he has evidence of damage, and that his allegation of damage is not mere matter of speculation. The Code requires an affidavit which must show a cause of action, and, necessarily, where the damages are unliquidated, show the amount of damage in order to entitle the party to an attachment. A complaint will not suffice, because it is the office of a complaint to allege conclusions of fact deduced from evidence, whereas, it is the office of an affidavit to set out the evidence establishing these conclusions of fact. Therefore, although an allegation in the complaint that the plaintiff has suffered damage by reason of the breach of a contract to the amount of \$5,000 may be sufficient; yet in an affidavit such an allegation amounts to nothing because the evidence from which that conclu-

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sion is drawn is not set forth. The court must determine, from the evidence placed before it, whether a case is made out or not, and it is not for the party to judge for himself, which latter seems to be the opinion in view of the manner in which allegations in affidavits are frequently made. In the case at bar there is nothing from which the court can adjudge that the plaintiff has sustained a single dollar of damage. He may set out facts showing nominal damages, but no facts are spread upon this record going to show any real substantial injury which the plaintiff has sustained; this allegation that he has been damnified to the extent of \$5,000 is nothing but an expression of his opinion so far as these papers are concerned, and his opinion upon the subject cannot be considered by the court.

We think, therefore, in view of the deficiency of the affidavits in this case, the motion to vacate should have been granted, and the order should be reversed and the attachment vacated, with ten dollars costs of appeal and the disbursements.

BRADY and DANIELS, JJ., concurred.

Order reversed and attachment vacated, with ten dollars costs of appeal and the disbursements.

ENOS T. THROOP, APPELLANT, v. THE HATCH LITHOGRAPHIC COMPANY, RESPONDENT.

A trustee and stockholder of an insolvent corporation cannot, as a creditor, attach its property.

A trustee and stockholder of a corporation which has become insolvent cannot, as a creditor thereof, commence an action against such corporation and obtain an attachment against its property upon the ground that the corporation has unlawfully assigned and disposed of its property with intent to defraud its creditors.

A trustee of a corporation is disabled, by the provision of the statute, from, in such manner, securing a preference over other creditors thereof in the payment of his debt.

The fact that such trustee has not been an active trustee in the management of the affairs of the corporation, and has had no influence with the other trustees, and that he has urged his co-trustees to take steps to put the company in the hands of a receiver, and that his co-trustees have conspired together to defraud him and the other creditors of the company, does not change his rights or position or remove his disability in the premises.

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APPEAL by the plaintiff Enos T. Throop from an order of the Supreme Court, made at a Special Term thereof held at chambers in the city of New York, and entered in the office of the clerk of the county of New York on the 3d day of July, 1890, vacating the warrant of attachment granted in the above-entitled action, and any and all levy made by virtue thereof on any property of the defendant, substituting James J. Nellis, as receiver of the Hatch Lithographic Company, in the place of the defendant in the action, and directing the sheriff of the county of New York to deliver to him, as such receiver, all property that had been levied upon, or was in possession of said sheriff, by virtue of said warrant of attachment or the levy made thereunder.

Page & Taft, for the appellant.

J. H. Rogan and *H. F. Lawrence*, for the respondent.

VAN BRUNT, P. J. :

The plaintiff was a trustee and stockholder of the defendant company, which, for many months prior to the application for the attachment in question, was hopelessly insolvent, and being a creditor of the corporation commenced this action and obtained an attachment against the defendant upon the ground that it had unlawfully assigned, disposed of and secreted its property, and was about to unlawfully assign, dispose of and secrete its property with intent to defraud its creditors.

A motion was made to vacate this attachment upon the ground that the plaintiff, being a stockholder and trustee of the company, could not secure a preference over the other creditors in the payment of his debt; which motion being granted, from the order thereupon entered this appeal is taken.

The question involved in this appeal was clearly decided in *Kingsley v. First National Bank of Bath* (31 Hun, 329).

It is urged that the language of the court in that case was more sweeping than was necessary to dispose of the questions there involved, and that it cannot be regarded as controlling the decision herein, because Riggs was a director and stockholder, and presumably an active one, and that it did not appear that he had any opposition in the board of directors, and that no defense was interposed to his suit, and judgment was entered by default.

In the case at bar it is claimed that the plaintiff was not an active trustee and had no influence with the other trustees; that three months before he obtained his attachment he urged his co-trustees to take steps to put the company in the hands of a receiver; that during this time he did nothing to secure his debt, and in the meantime the other trustees were conspiring to defraud him and the other creditors, the company being at the time entirely insolvent, having refused the payment of its debts; and, finally, the plaintiff having brought suit and obtained his attachment, the trustees put in an answer, although they allowed all other suits to go by default.

The claim of the counsel, therefore, seems to be that because a trustee is not active in the management of the company, therefore, the disabilities attaching to his office do not prevail, and, also, because his co-trustees are committing frauds upon the creditors in violation of the provisions of the statute, that the statute becomes inoperative as to him.

We fail to see that this condition of affairs makes any difference between the position of the plaintiff in this action and the plaintiff in the case cited.

That the mere fact of acquiescence upon the part of directors in allowing judgments to be taken by default is not a fraud under the statute is distinctly determined by the Court of Appeals in the case of *Varnum v. Hart* (119 N. Y., 101).

The disability to seize upon the assets of a corporation attaches upon the *office* of trustee or officer of the corporation, and while an officer may bring his action against the corporation for the purpose of securing an equal division of the assets amongst the creditors of the corporation, he cannot use any judgment obtained by him in such an action for the purpose of obtaining a preference in the payment of his own debt.

The courts have construed the provisions of the statute according to the intention of the legislature, and not according to its strict language. It seems to have been the intention of the legislature to prevent persons occupying confidential relations towards corporations from either directly or indirectly profiting by the information which they may have acquired because of their relation to the corporation, and which information they could use to the detriment of the general creditors of the corporation. Therefore, it has been pro-

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vided that where a corporation is insolvent, an officer of such corporation shall be unable to take any of the property of the corporation to pay his particular debt. The malfeasance of his co-trustees does not remove the disability under which he rested because of being a trustee, nor does it repeal the statute, and whatever hardships the plaintiff may have been compelled to submit to they afford no ground for the violation of the salutary rule which has so long prevailed.

The order should be affirmed, with costs.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DAVID J. BRANT v. CHARLES F. MACLEAN AND
OTHERS, COMMISSIONERS, ETC.

Removal of a clerk in the New York police department — no trial necessary — notice to the clerk of the charge is required.

A clerk in the police department of the city of New York may be removed by the board of police commissioners, under section 48 of chapter 410 of the Laws of 1889, after he has been informed of the cause of the proposed removal, and has been allowed an opportunity for explanation. No trial is contemplated by the act, nor is the production of evidence to establish the charge. The knowledge of the existence of the cause of removal by the head of the department is sufficient. The head of the department is the sole judge to determine the question whether the removal shall take place or not, but he can only act after hearing the explanation of the clerk whom it is proposed to remove.

People ex rel. Keech v. Thompson (94 N. Y., 451) followed.

CERTIORARI to review the action of the board of police commissioners of the police department of the city of New York in the removal of David J. Brant, theretofore a clerk in the police department in said city.

The writ was issued under date of January 31, 1890.

Louis J. Grant, for the relator.

John J. Delany, for the respondents.

VAN BRUNT, P. J. :

The relator was a clerk in the police department. On the 27th day of December, 1889, he was notified to show cause why he should not be removed from his office as clerk, because of neglect of duty and frequent and continued absence during official hours from the office of the department during the then present month and year, and that he would be allowed an opportunity of making an explanation in regard thereto at a meeting of the board of police on December 31, 1889, at 1.30 o'clock P. M. At the time appointed the relator appeared with his counsel, who demanded that the complaint be made more definite and certain, and also a bill of particulars. The relator denied having neglected his duty, or being absent "except on permission given him by his superiors, and case of sickness," etc. He was then asked as to his absences during the then present month. His counsel objected that he could not be called as a witness against himself, and that there was no evidence adduced against him, and ended by stating: "The board has refused to make the specifications more definite so that the defendant will have an opportunity to put himself on his defense and prepare his evidence." Subsequently, on the same date, the relator was called before the board and informed that he was charged with drunkenness. The relator denied the charge, and the commissioners called witnesses to prove the fact, and also that he was absent without leave. The relator offered no explanation, his counsel having left, which fact the relator wished noted. He was on the same afternoon removed.

If this removal cannot be sustained without considering what took place at the second hearing, we think that the relator is entitled to be reinstated. He was entitled by the statute to an opportunity to explain, and this necessarily means a reasonable opportunity. An opportunity does not seem to be reasonable where the clerk is called almost at the instant of being informed of the charge for his explanation. A reasonable time should elapse to allow the clerk proposed to be removed to prepare his defense.

But we think that the board of police commissioners had a right to remove the relator, independent of the charge of drunkenness. His counsel seems to have been of the opinion that the relator was entitled to a trial, to offer evidence to be confronted with witnesses

proving the charge. The section under which his removal was had contemplates no such procedure. (Laws of 1882, chap. 410, § 48.) It provides that no regular clerk or head of bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity for explanation, and in every case of removal the true grounds thereof shall be forthwith entered upon the records of the department. Prior to this enactment in the charter of 1873, the clerk could be removed at will, and it was intended as a restraint upon this absolute power. No trial is contemplated, and the production of evidence to prove the charge is not even hinted at. It seems to be only required that a cause should be assigned for which the clerk may be responsible, and of its existence the head of the department is the sole judge; but he can only act after hearing the explanation of the clerk proposed to be removed.

Here it may not be improper to notice the criticisms of the counsel for the relator upon the commissioners, because one of them made use of the expression, "contemplated action of the board." If the learned counsel had read the section in question he might have learned that it only applies to those cases where action is contemplated or where a removal is proposed, or, in other words, contemplated, because by its terms the clerk is to be informed of the cause of the proposed removal, and consequently the commissioners, in speaking of contemplated action of the board, did nothing but state what the statute required to exist before the relator could be called upon for an explanation.

If any authority is required to support the views above expressed, in respect to the rights of a clerk proposed to be removed, it is afforded by the case of *People ex rel. Keech v. Thompson* (94 N. Y., 451). The court say: "The next inquiry which arises is whether the commissioner committed an error in his decision in refusing to require that evidence should be given to establish the allegations made, and in not allowing testimony to be introduced in favor of the relator. The commissioner was acting by virtue of the statute already cited, and he was bound to follow its provisions and to fulfill its requirements and nothing more. There is nothing in the statute which requires that the cause of removal shall be established by proof taken before the commissioner. It seems to have been intended that the commis-

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sioner should exercise this power upon facts within his own knowledge, or based upon information received by him, after communicating to the relator his purpose of removing him, with notice of the reason why he proposed to take such action, and after allowing him an opportunity to make explanation as to the facts assigned as grounds for the removal. No testimony is required to be taken as to the basis of the commissioner's action. It is enough that he assigns a sufficient cause for the removal and furnishes an opportunity to the relator for explanation of the same. This tends to prevent removals without any cause whatever or upon personal or political grounds. It would be unnecessary to take proof of neglect or omission of duty within the knowledge of the chief of the department, and the statute does not require any such formality."

"The chief of a department, under the statute, is authorized and required to inform the subordinate of the ground which induced him to believe the subordinate to be negligent, unfit for duty or incapacitated to perform his duties, and for which he proposes to remove him. The statute makes no provision for a formal trial. It does not require that witnesses shall be produced by the commissioner, and that the officer shall be permitted to cross-examine the same, or that he shall be allowed to produce witnesses for himself, or to be heard upon a trial, but simply and alone allows him to make explanation and then leaves the matter of removal in the discretion of the commissioner."

"Having in view the fact that the commissioner, in the proper discharge of his duties would have knowledge generally as to any neglect or remissness of his subordinate officer, or that he would have information from which he would be justified in drawing an inference as to his acts and conduct, it is a fair and reasonable assumption that it was the intention of the statute to commit to the commissioner the power to remove for reasonable cause, to act upon his own knowledge as to the facts, and to determine when within his knowledge, so far as they were denied by the relator, and to judge whether the excuses presented by him were reasonable and sufficient so far as they were not denied. Such a discretion is not unlimited, and can only be exercised for some reasonable cause, as was held by ALLEN, J., in *People ex rel. Sims v. Fire Commissioners* (73 N. Y., 440). Without it the power of removal might be of little avail.

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If the commissioner was to be constituted a court for the purpose of trying every charge which might properly be preferred for violation of duty, it would tend very much to embarrass the action of that officer, and also interfere with the interest of the public. If a trial was to be had, the law, no doubt, would have so provided, and not for an explanation merely. In cases where the legislature intended that the removal should not be made without cause proven, provision is made for the preferring of charges and an examination of the same." (Laws of 1873, chap. 335, §§ 41, 77.)

It seems to be entirely unnecessary to add anything to this language, as it is as applicable to the case at bar as it was to the case cited.

The writ should be dismissed, with costs.

BRADY and DANIELS, JJ., concurred.

Writ dismissed, with costs.

THE METROPOLITAN ELEVATED RAILWAY COMPANY, RESPONDENT, v. CHARLES DUGGIN AND JOHN D. SLAYBACK, APPELLANTS, IMPLEADED WITH OTHERS.

Additional allowance to several defendants — how apportioned where the judgment is reversed on appeal as to some of such defendants.

On the trial of an action brought against nine defendants, who had interposed demurrers to the plaintiff's complaint, judgment was rendered in favor of the defendants, and separate bills of costs were awarded to some of the defendants, and \$750 was awarded to all of the defendants as an additional allowance. This judgment was affirmed at General Term, and separate bills of cost were taxed by the same defendants.

On appeal to the Court of Appeals that court reversed the judgment as to all of the defendants except two, as to whom it was affirmed, without costs.

Held, that the two defendants, in whose favor judgment of affirmance was rendered by the Court of Appeals, were entitled to full bills of costs at the General and Special Terms, but, if to any part thereof, only to their proportionate share of the additional allowance of \$750, namely, two-ninths thereof.

APPEAL by the defendants Charles Duggin and John D. Slayback from an order made at the New York Special Term, and entered in the office of the clerk of the county of New York on the 7th day

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of July, 1890, so far as it directed that the clerk of the city and county of New York satisfy of record the judgment entered in the office of the clerk of the City and County of New York on the 16th day of July, 1886, in favor of the above-named defendants and against the above-named plaintiff, upon payment or tender to the defendants Charles Duggin and John D. Slayback of the sum of ninety-six dollars and seventy-two cents, with interest thereon, being the full amount of the costs contained in said judgment, and the sum of \$166.67, being two-ninths of the extra allowance contained in said judgment.

George W. Weiffenbach, for the appellants.

Brainerd Tolles, for the respondent.

VAN BRUNT, P. J.:

This action was brought against the defendants Duggin and Slayback, together with seven others. Judgment was rendered in favor of the defendants upon demurrers, and separate bills of costs were awarded to some of the defendants, and \$750 was awarded to all of the defendants in addition to costs.

The judgment was affirmed at General Term, and separate bills of costs were taxed by the same defendants. The Court of Appeals reversed the judgment as to all of the defendants except Duggin and Slayback, as to whom it was affirmed, without costs.

These defendants claimed that they were entitled to be paid in full the judgments of General and Special Term for costs, and, also, the allowance, in addition to costs, of \$750. The plaintiff claimed that they were only entitled to their proportionate share of each. A motion was made for an order that the clerk satisfy judgments on payment of such proportion. The court denied this motion, but held that Duggin and Slayback were entitled to full costs at General and Special Terms, and to their proportionate share of the allowance, viz., two-ninths.

From this order Duggin and Slayback appealed, and the only question presented is, are they entitled to the whole allowance?

It would seem to be a sufficient answer to this claim that no such allowance has ever been made to them. Additional allowances are within the discretion of the court, and no court has, as yet, exercised

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its discretion in their favor. The allowance, as made, was to all the defendants, not to Duggin and Slayback, and if the respondent had appealed it might be claimed, with much greater force, that they were not entitled to receive any allowance, as the court has never awarded any to them alone.

It is urged that there is no difference, as far as the right of Duggin and Slayback are concerned, between the costs and the allowance, and that it is just as idle to speculate what allowance would have been awarded to them alone as it is to speculate on the amount of costs which they would have had.

We think that a part of this proposition is probably true, and that it is idle to speculate what allowance Duggin and Slayback would have had if successful alone; and, therefore, probably no part of the allowance should have been awarded them, as the discretion of the court, as we have said, has never been exercised in their favor under these circumstances.

As to the costs, however, the situation is different. As far as appears from the appeal papers, Duggin and Slayback were entitled, as matter of right, to costs; their amount is fixed by statute, and there is no speculation about it when they are awarded statutory costs.

The order should be affirmed, with ten dollars costs and disbursements.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK EX REL
JOSEPH C. HIGGINS, RESPONDENT, v. HUGH J. GRANT,
MAYOR, ETC., AND OTHERS, COMPOSING THE BOARD OF CITY
RECORD, APPELLANTS.

Return to a writ of certiorari—part of it cannot be stricken out by the court as irrelevant—if incomplete a further return may be ordered.

While the officers of a board, to which a writ of *certiorari* is directed, are required to return no more than a full account of the proceedings to be reviewed by means of the writ, no authority has been given to the court to strike out any part of the return because it may be irrelevant.

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Where omissions exist in the return, so that a full and complete return of the proceeding has not been made, the power has been conferred upon the court to order the making of a further return.

APPEAL by the Mayor, Aldermen and Commonalty of the City of New York from an order made at a Special Term of the Supreme Court and entered in the office of the clerk of the county of New York on the 9th day of May, 1890, which granted the relator's motion and directed that the return to a writ of *certiorari* issued in the above-entitled matter be amended, by omitting therefrom certain resolutions or proceedings, and by including therein certain requests made by the relator at a meeting of September, 1889, "to be confronted with the proofs and witnesses against him, and to call witnesses in his behalf."

Woolsey Carmalt, for the appellants.

John Jeroloman, for the respondent.

DANIELS, J. :

The course of proceeding to be taken and followed in applications for and proceedings upon writs of *certiorari* are now regulated and governed by the statute. And while the officers or boards to which the writ shall be directed are required to return no more than a full account of the proceedings to be reviewed by means of the writ, no authority has been given for striking out any part of the return because it may be irrelevant. The officers and boards to which the writ is frequently directed are not so accustomed to preside over legal proceedings as to ensure a strict observance of the directions and province of the writ in making their return. They are liable to transcend as well as to fall short of the directions in making their return. And when they have returned matters not relevant to the review of their proceedings, it has not been the practice to strike them out, but to disregard such matters in the hearing of the return. The court is more competent to do that than the persons usually are who are required to make the return. The statutory provisions contain no authority for correcting the return on motion by striking from it irrelevant statements. But the practice has been to permit them to remain in the return, and to review the decision made upon what took place upon and in connection with the hearing and

its discretion in their favor. The allowance, as made, was to all the defendants, not to Duggin and Slayback, and if the respondent had appealed it might be claimed, with much greater force, that they were not entitled to receive any allowance, as the court has never awarded any to them alone.

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As to the costs, however, the situation is different. As far as appears from the appeal papers, Duggin and Slayback were entitled, as matter of right, to costs; their amount is fixed by statute, and there is no speculation about it when they are awarded statutory costs.

The order should be affirmed, with ten dollars costs and disbursements.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOSEPH C. HIGGINS, RESPONDENT, v. HUGH J. GRANT,
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Woolsey Carmalt, for the appellants.

John Jeroloman, for the respondent.

DANIELS, J. :

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decision. That, too, is the safer course to be followed, for if the court, on motion, were permitted to strike out portions of the return it might be induced to extend its corrective authority to the exclusion of what might be very essential to a correct determination of the case. There is, at least, danger that the practice might result in injury to the relator's case, while there can be none in the exercise by the court of review of its unquestioned authority to consider only what may legally be pertinent to the case itself.

As to omissions, by which a full and complete return of the proceeding has not been made, there the case is clearly different. For the relator is then deprived of the right secured to him of a complete review of the proceeding against him. To avoid that the power has been provided for the court to order a further return. (Code of Civ. Pro., § 2135.) And it previously existed as fully as it has been here provided.

To entitle him to a further return the relator has sworn that the return is defective in the respects ordered to be supplied. It is not entirely clear that he is right, but, to avoid the possibility of injustice, a fuller statement from the board of the requests made by and on behalf of the relator, and the disposition made of them, are proper, for upon them and the disposition made of them his case may very considerably depend. The part of the order requiring the further return as to these matters was proper, and it should be maintained.

The order should, accordingly, be modified by reversing that part of it which directs any portion of the return to be stricken out, and denying so much of the motion, and affirming so much as directs the further return to be made. And this modification should be without costs of the appeal to either party.

VAN BRUNT, P. J., and BRADY, J., concurred.

Order modified as directed in opinion, and, as modified, affirmed, without costs of the appeal to either party.

TAENDSTICKSFABRIKS AKTIEBOLAGET VULCAN,
APPELLANT, v. ELIJAH MYERS AND J. HARBY MOSES,
RESPONDENTS.

Evidence—denial of knowledge as to incorporation—trade-mark—proof required in an action to prevent its use.

Upon the trial of an action, in which the complaint alleges that the plaintiff was a corporation organized and doing business under and by virtue of the laws of the Kingdom of Norway and Sweden, and the answer of the defendants is, “upon information and belief, they deny the plaintiff ever was or now is a corporation,” it is not necessary for the plaintiff to prove its existence as a corporation.

By section 1776 of the Code of Civil Procedure, such proof is not required, unless the answer is verified “and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation;” and by section 1779 it is provided that “an action may be maintained by a foreign corporation in like manner, and subject to the same regulations as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law.”

In order to maintain an action to prevent the use of a trade-mark by another, the law does not require proof that the trade-mark used by the defendant is a perfect or complete simulation or resemblance of that of the plaintiff.

Where the evidence is such as to present the question whether the resemblance of one trade-mark to another is such as will probably deceive purchasers, it is not necessary for the plaintiff to present further proof showing that purchasers have, in fact, been deceived by the defendants’ simulations of his trade-mark.

APPEAL by the plaintiff, upon questions of law and upon the facts, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 24th day of February, 1890, after a trial at the New York Special Term, and, also, from an order dismissing the complaint in the above-entitled action, entered in said clerk’s office on the same day.

The complaint, among other things, alleged “that, at the dates hereinafter mentioned, the plaintiff was, and still is, a corporation organized and doing business under and by virtue of the laws of the kingdom of Norway and Sweden.” The answer, among other things, alleged as follows: “and, upon information and belief, they deny the plaintiff ever was or now is a corporation.”

The action was brought by the plaintiff to obtain an injunction restraining the defendant from using a box containing matches,

because, as alleged, it infringed upon a label or trade-mark used by the plaintiff.

H. Aplington, for the appellant.

Michael H. Cardozo, for the respondents.

DANIELS, J. :

The parties to this action are manufacturers and dealers in matches. They have been put up and sold in boxes accompanied with labels, designated to be trade-marks. The label of the plaintiff is alleged to have been unlawfully imitated by that of the defendants, which is stated to have been devised and used to divert and obtain its trade, and to injure it in its business by the use of this label. At the trial of the action proof was given from which it is contended that the court would have been warranted in finding that these allegations had been sustained, but it was not definitely acted upon by the court, for the complaint was dismissed at the close of the plaintiff's evidence, on the motion of the defendants. This motion was made on the ground that the allegation that the plaintiff was a corporation, which the answer denied, had not been proved ; that no cause of action had been proved ; "that there is no such similarity between the plaintiff's trade-mark or label and the defendants' as would warrant a court of equity granting an injunction in the absence of proof that people have been deceived," The justice presiding then responded : "My impression is that in the absence of such proof you have not made out a case, and I, therefore, dismiss the complaint.

It was alleged in the complaint that the plaintiff was a corporation organized and doing business under and by virtue of the laws of the kingdom of Norway and Sweden. The denial of the defendant was "upon information and belief they deny the plaintiff ever was or now is a corporation." This denial would be wholly insufficient to require proof of the existence of the plaintiff as a corporation if it had been alleged to have been created under the laws of this State. For by section 1776 of the Code of Civil Procedure, it has been enacted that such proof need not be given unless the answer is verified, "and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation." This was not

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an affirmative allegation within this section, and would not have entitled the defendants to insist upon this proof, if the plaintiff had been alleged to have become incorporated under the laws of this State. But the absence of that allegation was not important as long as it was alleged that the plaintiff was created a corporation under the laws of the kingdom of Sweden and Norway. For by section 1779 of this Code, it has been further declared that "an action may be maintained by a foreign corporation, in like manner, and subject to the same regulations as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law." To dispense with proof of the corporate existence of the plaintiff, in the absence of this affirmative allegation of an answer, was a regulation of the action in the case of a domestic corporation. It defined and prescribed the course of proceeding in the action. And as there was no specific provision requiring a foreign corporation to make proof of its corporate existence under this denial, it follows that proof of the plaintiff's incorporation could not be exacted without some regulation requiring it; that would be an invidious, as well as unwarranted distinction, needlessly embarrassing to the course and transactions of trade and business, so largely at the present time carried on in the commercial world by means of corporations formed under the laws of other States of this Union and of foreign countries. As there is no such regulation as required this proof, there was no ground presented for the dismissal of this complaint because of the absence of this evidence.

To maintain this or any other action for the use of the trade-mark of another, the law does not exact a perfect or complete simulation or resemblance. But what has been made necessary is, that there shall be such an imitation of the plaintiff's trade-mark by the defendants as is calculated to, and probably will, deceive purchasers into the belief that, in buying the defendants' articles, they are really obtaining those manufactured or dealt in by the plaintiff, and in that manner induce them to purchase the defendants' productions for those of the plaintiff. The law, to that extent, intends to afford the plaintiff protection against the artful and ingenious wrongs of rival dealers. This was so clearly stated in *Colman v. Crump* (70 N. Y., 573) as to justify a repetition of what was there said by Judge ALLEN, for it is specially applicable to and states the principle governing this

case. It was then said that "a party may have a property in, that is, an exclusive right to use a 'name, symbol, figure, letter, form or device' to distinguish goods manufactured and sold by him from those manufactured and sold by others, or to indicate when or by whom, or at what manufactory the article to which it is affixed is manufactured. This property right the courts will protect by injunction, and for its invasion the law gives compensation in damages. It is an infraction of that right to print or manufacture, or put on the market for sale and sell for use, upon articles of merchandise of the same kind as those upon which it is used by the proprietor, any device or symbol, which, by its resemblance to the established trade-mark, will be liable to deceive the public and lead to the purchase and use of that which is not the manufacture of the proprietor, believing it to be his. It is not necessary that the symbol, figure or device used or printed, and sold for use, should be a *fac simile*, a precise copy of the original trade-mark, or so close an imitation that the two cannot be distinguished except by an expert, or upon critical examination by one familiar with the genuine trade-mark. If the false is only colorably different from the true — if the resemblance is such as to deceive a purchaser of ordinary caution, or if it is calculated to deceive the careless and unwary, and thus to injure the sale of the goods of the proprietor of the trade-mark, the injured party is entitled to relief." (Id., 578.) And it may be added that the action will not necessarily be defeated by such points of difference as will be observable by placing the labels or trade-marks side by side, if the general appearance and prominent features prove to be so far identical as to induce dealers not having them both present, to accept the defendants' for the plaintiff's. And these principles have the approval and support of many other authorities. (*Munro v. Bead'e*, 55 Hun, 312; *Kinney Tobacco Co. v. Maller*, 53 id., 340.) And it was not in the least impaired or undermined by what was decided in *Morgan's Sons v. Troxell* (89 N. Y., 292), where the attributes of resemblance were too slight to produce the deception of even the "unwary."

When the evidence is such as to present the question whether the resemblance of the one symbol, or trade-mark, to the other is such as will probably deceive purchasers, then it is not necessary that further proof should be added that purchasers have been, in fact,

deceived by the defendants' simulation. The facts required to maintain an action to enjoin the infringement of a trade-mark were fully examined and discussed in *Manufacturing Company v. Trainer* (101 U. S., 51); and among the points accepted by the court is the conclusion that it is not "necessary to show that any one has, in fact, been deceived if the imitation is such as to prove that it is calculated to deceive ordinary purchasers using ordinary caution." (Id., 65.)

But the defendants had precluded themselves from resting upon the objection that proof had not been given that persons had not been deceived into the belief that their label was that of the plaintiff, for its agent was asked, "After that match was placed upon the market by the defendants, what effect, if any, did it have upon your trade of 'The Vulcan Match?'" And "Did the placing upon the market of 'The Vulture Match' have any effect upon the sales of 'The Vulcan Match' through you?" These questions were not correct in point of form. But that deficiency in them could well have been removed if they had been objected to on that ground. But they were not. The objections were made in the most general form. They were each only "objected to by defendants' counsel." And this objection was sustained and the evidence excluded, and the plaintiff excepted. These exceptions were well taken, for the plaintiff was at liberty to prove, if that could be done, that its sales had been reduced by placing the defendants' matches in this manner upon the market. And these general objections did not warrant the exclusion of the evidence expected to be obtained by these questions. (*Bergmann v. Jones*, 94 N. Y., 51.) But as it had been so excluded the defendants could not make the absence of this proof a ground for dismissing the complaint.

A very decided effort has been made to sustain this dismissal on the ground that the differences between the labels were such as to prevent the plaintiff from maintaining the action. But that position is not tenable, for it did not enter into the disposition of the case at the trial. The learned presiding justice, on the contrary, dismissed the action because of the absence of proof that the plaintiff was a corporation, and that people had been deceived by the defendants' label. As has already been seen, this proof was not required to be made, and the defendants by their own conduct had prevented themselves from insisting that the latter fact should

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be sustained by evidence, even if that could be otherwise held to be necessary.

There are important features of difference as well as resemblances in these labels, as will be seen by their inspection. But whether the plaintiff's label has been unlawfully infringed by the defendants is not a question now to be determined. The matches were shown to be exhibited for the purposes of sale, by the single box, although sold in packages. These boxes were each accompanied with the plaintiff's label. And there is reason to believe that the defendants' matches were sold in the same general manner with their labels. The following are two of these labels, each attached to the same wooden back-ground.

[Plaintiff's label here appears in]
original opinion.]

[Defendants' label here appears in]
original opinion.]

And followed by a fold presenting these appearances: Friction, space and words.

[Plaintiff's exhibit here appears]
in original opinion.]

[Defendants' exhibit here appears]
in original opinion.]

But as the complaint was dismissed for the causes which have been stated, and without considering whether there was any unlawful simulation of the plaintiff's label by the defendants, that question is not now presented for decision by the appeal. It is enough that the case was dismissed, because of the absence of proof on the facts which have been mentioned, and that these defects were unimportant. Whether the case did or did not, as the evidence was given, so present this fact of resemblance between the labels as to entitle the plaintiff to maintain the action, was not denied or considered at the trial, and, therefore, it has not been brought by the appeal before this court to be reviewed. (*Place v. Hayward*, 117 N. Y., 487.)

But as the case was disposed of the judgment cannot be sustained. It should, therefore, be reversed and a new trial ordered, with costs to the plaintiff to abide the result.

BRADY, J., concurred.

Judgment reversed and new trial ordered, with costs to the plaintiff to abide the event.

MARY A. P. TUCKER, PLAINTIFF, v. CORNELIA
GILMAN, RESPONDENT.

Assignment of judgment—liability of the assignee for costs, where the judgment is reversed on appeal.

Where a judgment, recovered before the trial court, is assigned, together with "all sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon," and such judgment is reversed on an appeal, the assignee of the judgment is liable for the costs recovered by the defendant by reason of the failure of the plaintiff's cause of action, and an order is properly made by the court directing the payment of such costs by such assignee.

The liability is not limited to the costs accruing after the assignment, but extends to all the costs of the action.

This rule is applicable to an action brought by the assignee of the receiver of a manufacturing company, incorporated under the laws of the State of New York, to recover the balance of sixty per cent of the defendant's unpaid subscription for the stock of such company, where the plaintiff fails to recover judgment by reason of the complaint setting forth a claim for the recovery of the amount unpaid and owing by the defendant on the shares of stock of the corporation subscribed for, instead of a cause of action for the ascertainment and adjustment of the amount which is properly payable by such stockholder in order to satisfy the debts of the company.

It is only when the judgment attempted to be assigned has been recovered upon a cause of action, not itself assignable or transferable, that the attempted assignment will not operate to charge the assignee with the costs of the action where such judgment shall be subsequently reversed on appeal.

The liability cannot be avoided by the omission of the assignee to take active charge of the prosecution of the action, as it results from the assignment itself, by which the assignee becomes entitled to the advantages of the litigation in case of its success.

APPEAL by Preble Tucker from an order of the Supreme Court, entered in the office of the clerk of the county of New York on the 2d day of July, 1890, as amended by an order, entered July 3, 1890, directing that the said Preble Tucker, as a person beneficially interested in the recovery in this action, pay to George H. Fletcher, attorney for the defendant herein, the costs recovered by the said defendant Cornelia Gilman against the plaintiff herein, amounting to the sum of \$970.11.

The action was brought by the plaintiff, as the assignee of the receiver of the Kings County Manufacturing Company, to recover \$9,000 alleged to be a balance unpaid upon stock which the defend-

ant held in a certain corporation known as the Kings County Manufacturing Company. Judgment was recovered against the defendant at the circuit for \$10,323.34, and an appeal was taken therefrom, pending which appeal Preble Tucker took an assignment of the judgment.

Upon the appeal to the General Term the judgment below was reversed, and on appeal to the Court of Appeals judgment absolute was rendered against the plaintiff and the costs were taxed at \$970.11.

Charles J. Hardy, for Preble Tucker, appellant.

George H. Fletcher, for the respondent.

DANIELS, J.:

The plaintiff, as the assignee of the receiver of the Kings County Manufacturing Company, a corporation formed under the manufacturing laws of this State, brought this action to recover the balance of sixty per cent of the defendant's unpaid subscription for the stock of the company. The receiver was appointed on the petition of the assignees in bankruptcy of Frances Mirick, who was a judgment-creditor of the corporation. She recovered a judgment at the trial for the amount owing by the defendant on her subscription. And after it had been entered she made a written assignment of the judgment, "and all sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon." An appeal was taken from the judgment, which was afterwards heard by this General Term, and the judgment was reversed and a new trial ordered. An appeal was then taken to the Court of Appeals, where this decision was affirmed. Both decisions proceeded upon the construction of the statute declaratory of the liability of shareholders for their unpaid subscriptions, holding an action in equity, and not an action at law as this was, to be the appropriate remedy for the enforcement of the liability. The statute has made the shareholders liable upon their unpaid subscriptions so far as to pay on each share the sum necessary to complete the amount of the share as fixed by the charter of the company, or for such proportion of that sum as shall be required to satisfy the debts of the company. (2 R. S. [6th ed.], 391, § 5.) And to ascertain and adjust these

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amounts is the province of an action in equity. And the plaintiff failed to secure redress for the reason that she failed to acquire the right to maintain that action, and did not, in fact, proceed in that form. But the cause of action presented by her complaint was for the recovery of the unpaid amount owing by the defendant on the shares of the corporation taken by her. And it is the costs, recovered by the defendant on this failure of the plaintiff's action, that the assignee has been ordered to pay.

This order was made under the authority of section 3247 of the Code of Civil Procedure, which has provided "where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person, not a party to the action; the transferee, or other person so interested, is liable for costs, in the like cases, and to the same extent, as if he was the plaintiff; and where costs are awarded against the plaintiff, the court may, by order, direct the person so liable to pay them." And this assignment had the effect of transferring to the assignee the cause of action on which the plaintiff endeavored to maintain her action. For, by section 1912 of the Code of Civil Procedure, a judgment for a sum of money, which this judgment was, may be transferred by assignment, and it is only when it may have been recovered upon a cause of action not itself assignable or transferable, that it will fail to transfer the cause of action in case the judgment shall be afterwards vacated or reversed. This was not such a cause of action. It was for a debt owing by the defendant and recoverable by the creditors of the corporation, so far as it might be necessary to satisfy the debts of the company, and proportionately with the liability similarly existing against other shareholders for their unpaid subscriptions. The liability was in no sense a penalty, but it was for what the subscribers had rendered themselves liable to pay in purchasing the shares of the company. And that was transferable before judgment under the general principles of the law concerning the assignability of choses in action. The assignment of the judgment, therefore, did assign the cause of action asserted by the plaintiff as the foundation of her suit. And that is the effect which such an assignment of a judgment was held to have at common law. It operated as an assignment of the cause of action itself. (*Bolen v. Crosby*, 49 N. Y., 183;

Spears v. Mayor, etc., 87 id., 359, 369.) And both by this section of the Code, as well as the principle supported by these authorities, the assignee became, by the assignment made to him, the owner of this cause of action and liable to pay the costs of defending the action.

This liability has not been limited to the costs accruing after the assignment. But it includes all the costs, for section 3247 has declared that the transferee "is liable for costs in the like cases, and to the same extent, as if he was the plaintiff;" and that plainly includes all the costs which shall be recovered by the defendant.

It is no legal answer to this liability that the plaintiff, in the end, proved to have no well-founded cause of action. If it were, then the assignee would in all cases escape the liability which the statute has declared, for where the plaintiff has a good cause of action the assignee would not be liable at all; and if he were not, when the plaintiff failed to establish a cause of action the statute would provide the way to defeat its own enactment, which plainly could not be the intention of the law. It is only when the plaintiff fails that the assignee is liable for the costs. And an actual right of action could not have been intended to be necessary to produce that liability. The most that the statute can be held to have required is that the assignment shall be of the alleged cause of action which by the result of the litigation shall be defeated. The design evidently was to declare the assignee liable for intermeddling or dealing in the unfounded legal controversies of other persons. He can, by the assignment to him, acquire all the chances of success, but after he shall have done that and they fail then, under this law, he may be ordered to pay the costs of the defendant. The liability follows the assignment of the asserted, not a real, cause of action.

Neither can this liability be avoided by his omission to take the active charge of the prosecution of the action. For it has been made to result from the assignment itself, by which the assignee becomes entitled to the advantages of the litigation in case of its success. All that is requisite is that the cause of action, whatever it may be when it is capable of being transferred, shall become the property of the assignee. And that property will be derived from the assignment alone.

By taking the assignment the assignee made himself a party to the litigation. From that time it was carried on wholly for his

benefit. If it had resulted favorably, the proceeds would have belonged to him. It was his suit, and it was by his permission that it afterwards went forward in the name of the plaintiff. He voluntarily assumed that relation to the action. And the merits were as fully heard for him as they could have been if he had been in name, as he was, in fact, the party prosecuting. He acquired the litigation with all its consequences, one of which was this liability.

There is no foundation whatever for the objection that this section of the law is in conflict with the Constitution of the State. It has gone no further than to permit the assignment, subject to the condition that the assignee shall assume the payment of the costs when there shall be an adverse result. And he accepted this condition when he took the assignment. The law has deprived him of no right whatever, but he has done that himself by his own voluntary act. He was at liberty to subject himself to this liability or not as he himself elected. And as he chose to do so for the expected advantages, he must abide by the result the law declared might follow his failure. There was no constitutional restraint standing in his way. It was a matter of pure volition on his part whether he would take this risk which the statute had declared. He did take it, and cannot complain that the law is now enforced against him.

The order should be affirmed, with ten dollars costs and the disbursements.

VAN BRUNT, P. J., and BRADY J., concurred.

Order affirmed, with ten dollars costs and disbursements.

IN THE MATTER OF THE ESTATE OF ALFRED G. McQUEEN,
DECEASED.

BENJAMIN J. BLANKMAN, RESPONDENT, v. J. McQUEEN,
AS ADMINISTRATOR, ETC., APPELLANT.

Costs on the reference of a disputed claim against an estate.

The proceedings in the case of a disputed claim against an estate, which is referred under the provisions of the Revised Statutes, are controlled by the Revised Statutes, as regards the allowance of costs therein, and not by the Code of Civil Procedure.

Under the Revised Statutes the costs are represented by the disbursements, and do not necessarily include the allowances provided for in the fee bill in actions.

APPEAL by the defendant, as administrator, from so much of an order of the Supreme Court, entered in the office of the clerk of the county of New York on the 27th day of June, 1890, as awarded costs and disbursements to the plaintiff therein.

By the order in question, which was made upon the report of a referee, in proceedings under the statute, in reference to a claim against the estate of Alfred G. McQueen by an alleged creditor thereof, it was ordered "that the said report of the referee herein be, and the same is in all things, confirmed, and that judgment be entered for the plaintiff herein for the amount found due him, and that plaintiff recover his taxable costs and disbursements in the proceedings before said referee."

Allen McDonald, for the appellant.

D. C. Briggs, for the respondent.

VAN BRUNT, P. J. :

In the cases of disputed claims against an estate, which are referred under the statutes, it was held in the case of *Denise v. Denise* (110 N. Y., 568) that these proceedings were governed by the Revised Statutes, and their provisions controlled the question of costs. Therefore, where a claimant is entitled to costs in these proceedings, it is the costs referred to in the Revised Statutes, and not costs as mentioned in the Code. Costs under the Revised Statutes were the disbursements, and not necessarily the allowances provided for in the fee bill in respect to actions. The order appealed from seems to

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contemplate the allowance of costs as taxable under the Code. This was error, and the order should be modified in this respect.

The cases of *Hopkins v. Lott* (111 N. Y., 579) and *Haushurst v. Ritch* (119 id., 621) in no respect modify *Denise v. Denise*.

The order appealed from should be modified by striking therefrom the words "taxable costs," and, as modified, affirmed.

BRADY and DANIELS, JJ., concurred.

Order modified as directed in opinion, and, as modified, affirmed.

IN THE MATTER OF THE PETITION OF MATILDA MYERS FOR
AN ALLOWANCE OUT OF THE ESTATE OF ALFRED G. MYERS,
DECEASED.

IN THE MATTER OF THE PETITION OF LOUISA MYERS FOR AN
ALLOWANCE OUT OF THE ESTATE OF ALFRED G. MYERS,
DECEASED.

Liability of a firm, which continues after the death of one of its members to use the securities of such member in its business.

A testator left his estate in trust to certain trustees, one of whom was his partner in business. Upon the death of the testator a new firm was formed and all the accounts of the old firm were charged to the new firm, which continued to carry on the business theretofore transacted by the firm of which the testator was a partner.

The personal estate of the testator was represented by stocks and securities held and carried for customers by the firm of which he had been a member, which stocks and securities passed into the control of the new firm and were afterwards mainly employed in carrying on the business transacted by it, of dealing in stocks and securities. A large amount of money held by the firm was deposited in a trust company, which paid two per cent interest on the deposit, which deposit, however, was subsidiary to the business of the new firm.

Held, that the new firm was properly charged with interest upon such assets of the estate of the testator at the rate of six per cent per annum.

That as all the partners of the new firm were aware of the fact of this use of the trust estate, or if they were not aware of it, were chargeable with the duty of ascertaining the use so being made of it, and neglected to perform their duty, that they were all obligated to pay the interest, and that such obligation was not satisfied by the payment of the two per cent interest received upon the deposit in the trust company.

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APPEALS by R. Baring Gould, John A. Rutherford, Richard King and J. Champlin Morris from the decrees of the surrogate of the county of New York, entered in his office January 29, 1889, confirming the report of a referee, and directing them to pay to the attorney of the petitioner in the first above-entitled proceeding the sum of \$6,176.31 on account of her share of the income of the estate of Alfred G. Myers, deceased, and the sum of \$183 out of the principal of the estate for one-half the referee's and stenographer's fees on the reference ordered on the petition, and answer made to the same; and from a like order directing the executors to pay to John W. Thomson, as committee of the person and estate of Louisa Myers, or to his attorneys, the sum of \$6,176.31 on account of the income arising out of the same estate, and the sum of \$183 out of the principal of the estate for one-half the referee's and stenographer's fees on the reference ordered on the issues framed by the answer of the executors to her petition.

Edgar M. Johnson, for the executors, appellants.

George M. Thomson, for the respondent Matilda Myers.

Foster & Thomson. for the respondent Louisa Myers.

DANIELS, J. :

These proceedings were commenced at different times, but they were finally heard and decided together. The referee, to whom the issues in them were referred, made one report equally applicable to and disposing of the issues framed by the answers of the executors to each of the petitions. The report was confirmed by two different orders or decrees directing the moneys to be paid for and on account of each of the petitioners. The proceedings have not been strictly regular, neither have the directions contained in section 2545 of the Code of Civil Procedure been complied with. But as no objection has been taken to them in either respect, and the evidence, as well as the facts proved by it, are fully and clearly before the court, the case may still be considered and decided and these appeals determined.

The petitioners are sisters of the deceased testator, who departed this life on the 4th day of March, 1887, unmarried, leaving them and an only brother surviving him. And the orders or decrees from which the appeals have been brought have disposed of the income

of the estate, from the decease of the testator to the 28th day of September, 1888. This was found to be the sum of \$19,050, from which the executors had made previous payments to and on behalf of the petitioners, and for the payment of taxes, amounting to the sum of \$6,757.19, leaving a present balance of \$12,292.31, which was directed to be divided equally between the petitioners.

Proceedings were pending to revoke the probate of the will, but the brother, by whom they were commenced, consented in writing that the income of the personal estate should be paid to his sisters, but without prejudice to those proceedings. Their pendency, therefore, in no way interfered with the success of the petitioners' applications.

They claimed the income of the personal estate as the beneficiaries in a trust directed to be created for them by the testator. His directions as to this trust, as well as the final disposition of the property, were as follows :

"After payment of the specific legacies hereinafter bequeathed, I give and bequeath all my personal property of whatever kind, and also the proceeds of my seat in the Stock Exchange, except as hereinafter disposed of, to Richard King, R. Baring Gould, J. Champlin Morris and John A. Rutherford, in trust to collect, invest and reinvest the same, and pay the income thereof in equal shares to my sisters Matilda Myers and Louisa Myers, and I direct that executors should receive the compensation allowed by law, and that no bond or other security be required of them, or either of them, for the proper performance of their duty. At the death of the last surviving of my sisters I direct that one-half of the principal of my estate be given to my friend and partner, John A. Rutherford, forever, and that the other or remaining half shall be given to William Walton Rutherford forever."

And no question has been made as to their right to the payment of this income, but the executors claimed that they had already paid over all that the beneficiaries were entitled to receive from them. This was contested and denied by the petitioners, and they were sustained by both the referee and the surrogate in the proceedings following the issues in this manner produced. The executors, however, contend that injustice has been suffered by them through the decisions which have been made. In arriving at the result they

have been charged with interest, or income at the rate of six per cent, while they have conceded less than half that rate as the income realized from the personal estate by themselves.

The testator was a member of the firm of Myers, Rutherford & Co., which was composed of himself and the executor, John A. Rutherford, who were engaged in business as brokers and dealers in securities and stocks, and the personal estate of himself was in that firm. Upon the occurrence of his decease a new firm was formed under the name of Myers, Rutherford & Co., in liquidation, in which the executor, John A. Rutherford and his brother, are members. This firm commenced business the next day after the testator's decease, and all the accounts of the old were changed to the new firm, which thereupon went on with the same business. In this manner it acquired the stocks, bonds and other securities of the preceding firm, and continued its dealings in stocks and securities for responsible customers, for whom it carried these securities, and charged them a uniform rate of six per cent for doing that. On the 2d of May, 1887, the personal estate of the testator was appraised at the sum of \$180,852.02, and, so far as it consisted of stocks and securities, this passed into the new firm in the manner already mentioned, and was afterwards mainly employed in carrying on that business.

A large amount of money was deposited in a trust company which paid a very low rate of interest on the deposit. But it is quite plain, from the evidence, that the executors cannot be relieved from the liability to pay a greater rate of interest than that which they received from that source, for the deposits were, in fact, subsidiary only to the business of the new firm. The certificates themselves are proof that they were not taken on account of the executors, but were, in fact, the property of the firm up to the time of their assignment, which was not earlier than the commencement of these proceedings, and then was evidently intended to be no more than colorable. These deposits were no more than incidents of the business, and supplied in part the means of carrying it on. And so far as capital was employed, the firm received for that employment this return of six per cent. For that object it had the use and benefit of this personal estate, and that entitled these beneficiaries to that rate of income. It was earned by the estate devoted

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to the trust, and where that is the fact the rule generally followed is to charge the trustees so employing it at least with simple interest. (Perry on Trusts [2d ed.] § 471 [4.])

And while the capital was in this way employed under the direct authority of but one of the executors, they are all subject to the obligation of making payment of this rate of interest, for all seem to have been aware of the fact of this use of the trust estate, or if they were not, they were chargeable with the duty of ascertaining what use was being made of it, and neglected the observance of that duty. This liability was considered in *Wilmerding v. McKesson* (28 Hun, 184) and (103 N. Y., 329), and an obligation as strict as that was held to be incurred by each of the trustees under such directions as were given to them by the will of this testator.

Nor was it in any degree improper to extend the liability back to the time of the decease of the testator, for it was from that time that his estate had, in this manner, been employed and this rate of interest had been realized. That was the rate obtained by the firm which was dissolved by his decease, and, by carrying the same business immediately into the firm formed the next day, the same rate continued to be chargeable and collectible by it. And as the customers were responsible persons no reason presents itself for doubting that it was, in fact, collected.

This rate of interest was allowed upon the round sum of \$180,000, being within \$852.08 of the appraised amount of the testator's personal estate. In the appraisement made the sum of \$14,000 was the value of his undivided half of a seat in the New York Stock Exchange which had not yielded any income. The sum of \$10,503, the appraised value of suspended securities, also went to make up the amount of the appraisement. And so did specific articles of jewelry, silver, plate, horses, vehicles and other articles, producing no income. These articles were appraised at the value of \$1,891.

The referee has stated in his report that the seat in the Stock Exchange, and the suspended securities and other items from what has been called the I. R. account, had not been included by him in his valuation of the personal estate. And to reach his valuation, after rejecting them, he must have considered that the remaining part of the estate so far exceeded the appraisement in value as still

to be worth the amount of the appraisement. But, while the evidence of the surviving partner indicated that the personal estate would finally exceed the appraisement, it was not satisfactorily proven that such was its condition when the hearing was had. Certainly not to the extent of equalling these deductions. The presumption is that the appraisement was approximately accurate, and it was the safer course to act upon that as long as the evidence left it indefinite to what extent the valuation would finally be found to go beyond that amount. The evidence before the referee was in that condition. The personal estate may considerably exceed the appraisement in value, or it may still remain nearly at that amount. And, for the present purposes, that should be adopted as the valuation of the personal estate. And that will reduce the amount on which the six per cent should be paid to no more than \$154,458.08, instead of \$180,000, assumed by the referee and finally sanctioned by the surrogate.

The surrogate has directed the fees of the referee and stenographer to be paid out of the principal of the estate of the decedent. This direction should be so modified as to exclude what has been devoted to the creation of the trust. For that has been made inalienable during the continuance of the two lives for which the trust has been provided. (3 R. S. [5th ed.], 22, § 84.) And this section has been made applicable to a trust created in personal property. (Id., 75, § 2.) And a like rule previously prevailed.

The surviving partner, who was one of the executors, was asked whether he had been carrying securities for any of the other executors, since the death of Mr. Myers. This was objected to as an inquiry into the private business of the executors. The objection was not sustained, and the counsel for this executor excepted. And he answered that the account which was called Harney, was the account of Mr. Baring Gould, who is an executor of this estate. This was an irrelevant inquiry. But at the same time the exception is unimportant. For the right of the petitioners to the percentage allowed to the extent, or nearly to the extent which has been mentioned, was proved beyond all ground of reasonable controversy, by the evidence obtained from the executors themselves. And they were in no respect injured by this answer, which did not and could not enter into the final decision of the applications.

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No other objections appear to merit attention in the determination of the appeals. But the orders or decrees should be modified by reducing the amount on which the six per cent is calculated to the sum of \$154,458.08. And the referees and stenographer's fees should be directed to be paid out of that part of the estate, not included in the trust or its income, directed to be maintained for the benefit of the petitioners. And neither party should have costs on these appeals.

VAN BRUNT, P. J., and BRADY, J., concurred.

Orders or decrees modified as directed in opinion, and as modified, affirmed, without costs on these appeals.

THEODORE HAEBLER AND OTHERS, APPELLANTS, v. ELIJAH MYERS AND OTHERS, RESPONDENTS.

Attachment set aside — effect of a reversal of the judgment vacating it upon the rights of subsequent attaching creditors.

A number of attachments having been issued in different actions, levies were made thereunder upon the same property. The earlier attachment was thereafter set aside on the motion of a subsequent attaching creditor, and the property was sold under the subsequent attachment, and the proceeds thereof were paid over by the sheriff to the parties obtaining such subsequent attachment.

Held, that the attachment so set aside could not be revived by the reversal of the judgment which vacated it, so that it would be reinstated as a lien upon the property, or upon the proceeds of the sale of the property attached.

That the subsequent attaching creditor, who had received the proceeds of sale of the property, could not be required to pay it over to the creditor whose prior attachment has been restored by the reversal on appeal of the judgment which vacated it.

APPEAL by the plaintiffs from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 24th day of February, 1890, and from an order, entered in said office on the 24th day of February, 1890, by which judgment and order it was directed that the complaint in the above-entitled action be dismissed and that the defendants recover from the plaintiffs the costs of the action.

The complaint alleged that the plaintiffs had brought an action against John J. Bernhearth and others, in which a warrant of

attachment had been procured and levied upon the property of the defendants in that action; that Elijah Myers and I. Harvey Moses, subsequent lienors upon the attached property, had obtained an order to show cause why the plaintiffs' attachment should not be vacated, on the return of which an order was entered vacating the plaintiffs' attachment. After the vacating of the plaintiffs' attachment the sheriff paid over to the defendants Elijah Myers and I. Harvey Moses, the subsequent lienors, the sum of \$900 realized from the attached property. The order vacating the plaintiffs' attachment was subsequently reversed on an appeal to the Court of Appeals. The complaint demanded judgment for the restitution of the said sum of \$900 obtained by the defendants by reason of the vacating of the plaintiffs' attachment.

To this complaint the defendants demurred on the ground that it did not state facts constituting a cause of action.

M. P. Stafford, for the appellants.

M. H. Cardozo, for the respondents.

BRADY, J. :

Aside from the reasons given by the presiding justice at Special Term, it may be said that the plaintiffs' duty, if they hoped to protect their lien by a successful appeal, required them to obtain a stay of proceedings, for which application should have been made, and which would doubtless have been granted. The plaintiffs and defendants were both lienors, the right of each dependent upon the validity of the attachment by which the lien was created, and both subject to such disposition of it as might be made by the courts. When the plaintiffs' attachment was set aside the defendants took priority, indeed, of all the remaining attachments, if there were any, and it became the duty of the sheriff to pay the money to them. They did not receive money which belonged to the plaintiffs, inasmuch as their supposed lien was declared worthless. It was the money of the judgment-debtor which they received, and to which they were entitled by the law as then declared.

There is no provision of law by which an attachment discharged by competent authority can be revived by the reversal of the judgment destroying it with all its primitive advantages intact. The

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subsequent attaching creditor does no wrong in accepting the money under such circumstances. He avails himself of the law as declared, the result of which might be prevented by the diligence of the defeated attaching creditor in obtaining a stay of proceedings as already suggested.

The judgment appealed from should be affirmed, with costs.

DANIELS, J., concurred.

Judgment affirmed, with costs.

WILLIAM W. DUDLEY, APPELLANT, v. THE PRESS
PUBLISHING COMPANY, RESPONDENT.

A plaintiff avoiding service of an order — will not be heard on a motion to vacate it.

It is the duty of the plaintiff in an action, to obey the orders of the court, made for the purpose of promoting the proceedings in the litigation, and where an order is obtained for the examination of the plaintiff as a witness before trial, and the plaintiff intentionally avoids placing himself where he may be personally served with the order, he will not be heard by the court on an application to vacate it.

In such case the plaintiff is not entitled to the assistance of the court, either by having it consider the grounds upon which the order has been made, or determine whether or not they are supported by the facts which the affidavits, upon which such order was obtained, establish.

APPEAL by the plaintiff from an order of the Supreme Court, entered in the office of the clerk of the county of New York on the 13th day of May, 1890, by which it was ordered that the plaintiff's motion to vacate and set aside an order, dated February 15, 1890, and to vacate and set aside an order, dated January 20, 1890, be and the same hereby is denied, with ten dollars costs, to be paid by the plaintiff to the defendant.

George Bliss, for the appellant.

De Lancey Nicoll, for the respondent.

DANIELS, J.:

This action is for the recovery of damages for the publication of an alleged libel, and it was commenced in November, 1888. On the application of the defendant an order was thereafter made

directing the plaintiff to appear and submit to an examination, for the purpose of supplying the defendant with such information as was sworn to be necessary to enable it to frame and serve its answer, and an order was made extending the time to answer for the purpose of taking this examination of the plaintiff.

The order for his examination was not served upon him for the reason, as it was there stated, that he could not be found within the State to make this service upon him, and an application was made in his behalf to vacate the order extending the time for the defendant to answer. This motion was denied because of the inability to serve the order for the examination of the plaintiff upon him on account of his continued absence from this State. And upon an appeal from that order to the General Term, the order was affirmed substantially for that reason. (*Dudley v. Press Publishing Co.*, 53 Hun, 347.)

Since that time other orders of the same character have been made to obtain the examination of the plaintiff and to extend the time for the defendant to answer, until the information desired to be obtained shall be secured by his examination. They were continued to the 1st of January, 1890, when the order for the examination of the plaintiff was made, which it was the object of this motion to vacate and set aside.

On the 23d of January, 1890, the further order followed allowing the order for the examination of the plaintiff to be personally served upon him wherever he might be found. This service, as well as others made upon the plaintiff, was to comply with the suggestion contained in the decision of the preceding appeal, that the order for his examination should be served upon his attorneys, and also upon himself, even though he should not be found within the limits of the State. The object of this was not to obligate the plaintiff to appear and submit to the examination as he would have been obligated to do if the service had been made upon him in this State pursuant to the directions contained in section 873 of the Code of Civil Procedure; but it was with the expectation that if he did not intend to evade the regular service of the order, and was willing to comply with the directions given by the court, he would arrange in some way for his voluntary appearance in the proceeding, and thereby comply with the directions contained in the order. But

that he has failed to do, and what has been accomplished by the service of the orders upon him out of the State is to prove that the defendant has performed all that was within its power to bring about the plaintiff's appearance and secure his examination. But this has proved unsuccessful, for the plaintiff at no time has indicated any disposition on his part voluntarily to appear and answer in compliance with the directions. Not only has the service suggested been made of orders, but applications have been made to the attorneys for the plaintiff to secure his voluntary appearance for his examination; but all these have alike proved to be unsuccessful.

As to one of the orders it is stated in the affidavit of Mr. Keatinge, with apparent reliability, that the plaintiff was present in the city of New York, and registered as a guest at the Everett House on Sunday, November 24, 1889; that he had been served, personally, on the 16th of November, 1889, with an order requiring him to appear on Monday, the twenty-fifth of November, and submit to this examination. And that the order was made and served upon him as well as upon his attorneys are facts that are clearly established. But he did not appear as required by the order but left the city either on Sunday evening or Monday morning. These are facts, together with the others, establishing the service of other orders upon him, clearly indicating his intention to be not to comply with the orders made in this manner by the justices of this court. His disposition has been clearly manifested to avoid the obligation of complying with either one of these orders.

In support of the application to vacate the two orders, it has been stated in the affidavit of Mr. Bliss that, for some months past, the plaintiff had been in the city of New York at frequent intervals, and openly, and could have been served with the order by the use of reasonable diligence. And there is no reason for doubting the correctness of the statement of Mr. Bliss as to the presence of the plaintiff in the city of New York; but the fact is equally as well confirmed by the other affidavits made in the case, that information of his presence in this manner never has been brought to the attention of either the attorney for the defendant or any of the defendant's officers, and neither of these persons appear to have had any reason for supposing that the plaintiff was present in the city of New York at any time while he remained here.

No opportunity, therefore, was afforded to the defendant to make a personal service of this order upon the plaintiff. But, from the other circumstances in the case, especially those occurring in November, 1889, it is evident that the plaintiff has been actuated with the intention, when he has visited this city, of avoiding the service of the order and practically declining to obey its mandate. And under these circumstances the court could not, with any just respect for its own proceedings, listen to his application to vacate either of these orders. It is his duty, as a suitor in court, to obey the directions given by its justices for the purpose of promoting the proceedings in the litigation, and as long as he intentionally avoids placing himself where he may be personally served with the order, he cannot consistently expect to be heard in an application to vacate it. That it has been his intention to avoid the personal service of this order is further sustained by his omission to make any affidavit whatever explanatory of his failure voluntarily to appear, or of his successful avoidance of the personal service of the order.

That it is the duty of the court not to listen to an application of a party affected by this misconduct to vacate orders adversely to him has been considered and held, under somewhat like circumstances, in *Keenan v. O'Brien* (53 Hun, 30) and *Matter of O'Byrne* (55 id., 438), as well as in the preceding decision made upon the plaintiff's appeal.

If it shall be the intention of the plaintiff to submit himself to the personal service of an order for his examination, the least he can do will be to extend the information of that fact to some person interested in making or bringing about the service. For without information of that character from himself or some other source, the officers and attorney of the defendant have no reason to believe that any efforts they may make will result in bringing about the personal service of this order.

Under the facts as they are now presented, the plaintiff is not entitled to the assistance of this court either in considering the grounds upon which the orders have been made, or determining whether or not they are supported by the facts which the affidavits establish. As long as he intentionally avoids the personal service of the order, he must be contented to have the proceedings in the action suspended and practically stayed. And it may be, if this

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continued disposition to avoid service of the order for his examination shall be hereafter prolonged, that the court will consider it its duty altogether to dismiss his action. It is not necessary to determine that point at the present time, but it is sufficient that the facts which are proven do not entitle the plaintiff to any consideration of the merits of his application at the hands of the court.

And the order should be affirmed, with ten dollars costs and the disbursements.

VAN BRUNT, P. J., and BRADY, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

JEROME BUCK, RESPONDENT, v. W. SEWARD WEBB, AS
PRESIDENT OF THE WAGNER PALACE CAR COMPANY,
APPELLANT.

Loss of a drawing-room car ticket — right of the passenger, notwithstanding the loss, to occupy the seat — costs payable as a condition of granting a new trial, where a verdict is set aside as against evidence.

A passenger, who had purchased a ticket entitling him to a seat in a drawing-room car from Saratoga Springs to the city of New York, having lost the ticket applied to the agent who had issued it for another. The agent declined to issue another ticket, but gave the passenger his personal card with the statement thereon: "This gentleman holds seat in 'Nokomis,' this P. M. Mislaide. C. E. Benedict." With this card and his passage ticket the passenger took his seat in the drawing-room car, and when called upon by the conductor for his drawing-room car ticket explained the facts and produced the card of the agent. No other person appeared to claim the seat in question, but the conductor of the car declined to accept the card of the agent, with the explanation offered, and informed the passenger that he must then pay for the seat or leave the car. The passenger declined to pay and went into a common car.

In an action brought by the passenger to recover the damages arising from his removal from the drawing-room car:

Held, that as no other person made claim to the seat in the drawing-room car, and the particular ticket issued therefor could not be used at any other time on this or any other car, the conductor should have acted on the report of the agent and have allowed the passenger to remain in his seat, and that the railroad company was liable for the damages resulting to the passenger by reason of his removal therefrom. (VAN BRUNT, P. J., dissenting.)

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A party entitled to relief against a verdict not supported by the evidence, is properly required, as a condition of his obtaining a new trial, to pay the costs of opposing the motion and the costs of the trial, including witness fees and disbursements, but not to pay all the costs of the action, as a condition of the granting of a new trial.

APPEAL by the defendant from a judgment, entered in the office of the clerk of the county of New York on the 18th day of December, 1889, and from an order, entered in said clerk's office on the 22d day of November, 1889, granting a new trial upon the ground that the damages were excessive, upon the payment of all the costs and disbursements of the action, and also from an order of the Circuit Court, dated December 18, 1889, entered in the office of the clerk of the county of New York on the 7th day of January, 1890, denying a new trial, on the ground that the defendant had refused to pay such costs and disbursements.

Saunders, Webb & Worcester, for the appellant.

G. W. Cotterill, for the respondent.

DANIELS, J.:

The verdict was for the sum of \$1,000, for the damages which the jury concluded the plaintiff had sustained by his exclusion from seat 23, in the drawing-room car Nokomis, for which he had paid one dollar and fifty cents, for his passage from Saratoga Springs to the city of New York. The ticket had been obtained by him from an agent representing the company in the village of Saratoga Springs. And it in form entitled him to that seat, but only on this train and for the day on which it was issued. His evidence, which the jury must have credited to render the verdict they did in his favor, was that, after the purchase, the ticket had been lost. And he then repaired to the office of the agent for another, but as the diagram of the car, showing the seats for which tickets had been issued, had, in the meantime, passed out of his possession the agent declined, as he very well might, to issue another. He did, however, supply the plaintiff with his personal card, with the statement added that, "This gentleman holds seat in 'Nokomis,' this P. M., mislaid. C. E. Benedict." And with that and his passage ticket he took the seat. After the train had started the conductor of the car

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called upon the plaintiff for his drawing-room car ticket, and the explanation of these facts was made to him, with the production of the card of the agent containing the indorsement which has been mentioned. But the conductor of the car declined to accept this card with the explanation, for the occupancy of the seat, although it had been marked on the diagram as having been sold, and no other person had appeared to claim it by virtue of the lost ticket. The plaintiff was informed that he must then pay for the seat or leave the car. He declined to pay, and complying with the order of the conductor of the car he passed into a common car, which he testified was to some extent uncleanly, and continued there until the arrival of the car at the city of New York in the evening. It further appeared that the money paid by the plaintiff to the agent for the ticket was returned to and, it is to be presumed from the evidence, retained afterwards by the company, which, in this manner, had the advantage of the price of the seat without rendering the service. If the conductor had permitted the plaintiff to occupy the seat, it would have been his duty to issue a check for it, which the porter would have taken up and delivered to an officer of the company, when it would have been charged to the conductor. And it was the apprehension of the loss of the fare in this manner which seems to have induced him to withhold his consent to the occupancy of the seat by the plaintiff. But it is by no means sure that this loss would have been made to fall upon him if he had allowed the plaintiff the seat. The officers to be dealt with are usually reasonable, practical and fair men, and by the presentation of the agent's card, and information of the fact that this seat appeared on the diagram to have been sold, and remained unclaimed by any other passenger, they would, without doubt, have ratified the act of the conductor if he had allowed the plaintiff his seat. But, if they would not, that fact would not displace the plaintiff's right to it, and the loss, if it had occurred, must have been an incident of the conductor's employment.

By the facts that the seat appeared in the diagram to have been sold, and it was claimed by no other person, and the conductor was made aware of the fact by the presentation of the agent's card that the plaintiff was the purchaser, he had perfectly satisfactory evidence before him that the latter was entitled to this seat. It could not

have been more so if the ticket itself which the agent sold had been produced. If another person had appeared with it and claimed the seat, or if it could have been used on any other train or car, or on this car at any other time, the case would have been different, and have sustained the act of the conductor. But as no other person did claim the seat, and this particular ticket could be used at no other time on this or any other car, the conductor should have acted on the report of the agent and given this seat to the plaintiff. What the law exacts from carriers of passengers is reasonable conduct on the facts brought to their knowledge, or that of their agents and employees. And it was not reasonable to deny his seat to the plaintiff when his title to it was supported by all these facts.

A large array of authorities have been brought to the attention of the court by the defendant's counsel, as cases tending to shield the defendant from liability. But neither arose upon any state of facts bearing any substantial analogy to those now presented. They were either passage or fare tickets, not restricted to any car or train, or were detached in such a manner as to deprive the passenger of his right to the passage, or the time to which their use had been limited had previously expired, neither of these facts existed here, for the ticket had been sold for this seat on this trip by this car, and the conductor was assured of that fact by the report of the agent, and that the plaintiff was the purchaser. It was an improper use of his authority after that to send him into another car.

Certain rules of the company were introduced to sustain the action of the conductor. But they did not do that, for neither expressly nor by implication did they include it. Whatever wrong was suffered by the plaintiff was done by the employee of this company. There was no default whatever on the part of the company moving the train and carrying the plaintiff. But it was wholly confined to the defendant, which should be held liable to make adequate indemnity to him for the failure to perform its obligation with him. He was not bound to pay the price of the seat again, for he had already acquired the right to it, and was entitled to stand, as he did, on that right.

But while he was subjected to an indignity which could not fail to be attended with a disturbance of sensibility as well as mortification, he was not personally injured, nor were his rights further

invaded than by his exclusion from this seat, and the moral compulsion to which he then submitted of passing to and making his passage in another car. The company was liable to compensate him by way of damages for this injury. The case clearly is one for indemnity only, and not for punishment. In that respect the jury misjudged its duty by rendering their verdict for \$1,000. It exceeded all legal bounds of the injury, and that was considered to be the case by the justice presiding at the trial. But he was in error in directing the payment of all the costs of the action as one of the conditions on which a new trial was ordered. For the rule established by the authorities is, that the party entitled to relief against a verdict not supported by the evidence, shall pay the costs of opposing the motion and the costs of the trial, including witness fees and disbursements. Cases do arise where the court itself can, with reasonable fairness and intelligence, by its own action, determine the amount which should not be exceeded by the verdict. But this is not one of them. It is peculiarly adapted to the jury, whose discretion, however, should be restrained and guarded against unwarranted extravagance. That was not done.

And the order made should be so far modified as to direct a new trial on payment of the costs and disbursements of the trial, including the fees of witnesses, to be ascertained by adjustment after notice, before the clerk, and ten dollars costs of opposing the motion, and the defendant, in that event, should be allowed ten dollars costs and its disbursements on this appeal. If the defendant fails to pay such costs within the time designated by the general rules of practice, then the order should be affirmed, with the costs and disbursements, already mentioned, to the plaintiff on this appeal. But if the costs shall be paid, including the fee for opposing the motion, then the judgment should also be vacated with the verdict.

BRADY, J., concurred.

VAN BRUNT, P. J.:

I dissent from the result arrived at, because I do not think that any cause of action was made out.

Order modified as directed in opinion, and, as modified, affirmed.

Cases
DETERMINED IN THE
THIRD DEPARTMENT
AT
GENERAL TERM,
November, 1890.

EDWARD A. DURANT, JR., RESPONDENT, v. HENRY R. PIERSON, AS SURVIVOR OF THE FIRM OF HENRY R. PIERSON & SON AND ANOTHER, APPELLANTS.

General assignment — a preference, payable out of firm assets, of money advanced, after the dissolution of the firm, to the surviving partner, for the purpose of paying firm debts, is illegal.

By a general assignment for the benefit of creditors of the individual estate of the assignor, and also of the firm assets of a firm of which the assignor was the sole surviving partner, a preference was given, to be paid out of the firm assets, of an advance of money which had been made subsequent to the dissolution of the partnership by the death of the senior, and only other, partner, by a bank which had credited the amount thereof to an account kept in such bank in the name of the late firm, with the understanding that such money was asked for and was to be applied, and, in fact, such money was applied thereafter, to the payment of certain firm debts.

At the time that this money was credited to the account kept in the name of the firm the assignor and sole surviving partner gave a demand note to the bank for the amount of the loan, and signed it with the name of the firm, which was followed by the name of the assignor as survivor.

Held, that the claim of the bank was a claim existing against the surviving partner alone, and that the assignment, in so far as it directed this claim to be paid out of the firm assets, was fraudulent as against the firm creditors. (LONDON, J., dissenting.)

THIRD DEPARTMENT, NOVEMBER TERM, 1890.

APPEAL by the defendant Henry R. Pierson, as survivor of the firm of Henry R. Pierson & Son, and Robert C. Pruyn, as assignee of Henry R. Pierson, as survivor of the firm of Henry R. Pierson & Son, from the judgment of the Supreme Court, entered in the office of the clerk of the county of Albany on the 15th day of August, 1890, upon the report of Samuel W. Jackson, Esq., referee, with notice of an intention to bring up for review upon such appeal the report and findings of said referee, and the judgment entered thereon, the appeal being taken both upon questions of law and upon the facts.

The action was brought for the purpose of obtaining an adjudication that the general assignment for the benefit of creditors made by the defendant Henry R. Pierson, survivor of the firm of Henry R. Pierson & Son, a firm composed of himself and Henry R. Pierson, deceased, was fraudulent as to the creditors of said firm by reason of certain provisions therein directing that certain claims mentioned in said assignment should be paid out of the firm assets.

Marcus T. Hun, for the appellants.

G. L. Stedman, for the respondent.

LEARNED, P. J. :

The defendant Pierson and one Henry R. Pierson, his father, were copartners, doing business as bankers and brokers in Albany, under the firm name of Henry R. Pierson & Son, during the year 1889 and prior thereto, and until January 1, 1890, when Pierson, senior, died.

The firm kept their account with the National Commercial Bank, of Albany, of which Mr. Pruyn, one of the defendants, was president. At the time of the death of said Pierson, senior, the firm was insolvent.

On the ninth of January, the defendant Pierson came to the defendant Pruyn, as president of the bank, and said that he needed immediately \$15,000. Mr. Pruyn knew at that time of the death of Pierson, senior. Mr. Pruyn asked him what collateral he had, and he said none at present. Mr. Pruyn told him that they were frequently obliged to help their customers over hard places, and they simply depended on their honor to see that the amount was returned, and asked him if he thought it would be paid in a short time, to

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which he answered yes. Pierson then asked how he should sign the note. Mr. Pruyn told him that as this was for the firm, he should sign whatever was the proper and legal way. He said Mr. Hun had told him to sign H. R. Pierson & Son, H. R. Pierson, Survivor. Thereupon Pierson signed a note, of which the following is a copy:

\$15,000.

ALBANY, N. Y., *January, 9, 1890.*

On demand after date I promise to pay to the order of the National Commercial Bank of Albany, N. Y., fifteen thousand dollars at the National Commercial Bank of Albany, value received, with interest.

H. R. PIERSON & SON,

H. R. PIERSON,

Survivor.

The amount was credited to the account of H. R. Pierson & Son in the bank. Other sums amounting to \$24,000 were credited to this account on and before January fifteenth; and on the fourteenth or fifteenth \$20,000 was paid from that account to the Commercial Bank. Besides this, there was paid to depositors \$10,000, and for use of telegraph wire some \$400; these being debts of the firm. Such payments were made by checks of defendant Pierson, signed by him as survivor.

The purpose of Pierson, in applying for this loan, was to procure money to pay obligations of that firm; and this was understood by the bank to be the purpose at the time of such application.

On the 16th of January, 1890, the defendant Pierson, as survivor, immediately before executing the assignment hereafter to be mentioned, gave to said bank his check on said bank for \$4,850, as collateral security for payment of said \$15,000 note. Said check was charged against the account of H. R. Pierson & Son in the bank, and a certificate of a deposit purporting to be made by H. R. Pierson & Son, payable to the bank for the like amount, was given by the bank to the bank, and is held by the bank. This is called by the bank collateral to the note.

On the same 16th day of January, 1890, the defendant Pierson, as survivor and individually, made a general assignment to Mr. Pruyn. This provides, after paying wages and expenses, first for the payment of this note of \$15,000 and interest.

The plaintiff, a judgment creditor for a debt due by said firm prior to the death of Pierson, senior, brings this action to set aside the assignment. The learned referee who tried the case held the assignment to be void by reason of its preference of this \$15,000 note, which is to be paid out of the assets of the firm.

Another ground of alleged invalidity was the preference of a debt said to be owing to the receiver of certain insurance companies, of which said Pierson, senior, had been receiver up to the time of his death. It was urged that this was only a liability of the firm to said Pierson, senior, personally. But this view was not sustained by the referee, and, therefore, is not considered on this appeal.

It seems plain that the \$4,850 was a payment on this note, so far, at least, as defendant Pierson had a right to apply firm funds on an individual debt. The bank charged that amount against the account of H. R. Pierson & Son, and thus took the benefit of that amount by a reduction of its liability on the account. The making and holding of a certificate of deposit, signed by the bank officers and payable to the bank, did not alter the effect of the payment. But although the assignment provides for the payment of the note of \$15,000, without mention of this payment, probably this would not make the assignment fraudulent as matter of law.

The important question in the present appeal is upon the correctness of the learned referee's doctrine.

The note of \$15,000 was only the individual note of defendant Pierson. Whatever intent he may have had as to the use of the money, the legal effects of the note was to bind himself, and no one else. (*Van Keuren v. Parmelee*, 2 N. Y., 523; *National Bk. v. Norton*, 1 Hill, 575.) It was not a firm obligation, nor was it payable out of the firm assets as such. Nor does the fact that neither he nor the bank knew at the time that the firm was insolvent at the death of Pierson, senior, affect the character of the note. Nor did the manner in which the defendant Pierson signed the note make it anything more than his own individual liability. (*Haynes v. Brooks*, 42 Hun, 530.) Nor did this become a partnership indebtedness, because, as claimed, the avails were applied to the payment of partnership debts. (*National Bk. of Salem v. Thomas*,

47 N. Y., 15.) So that, in any view, this note was only the note of defendant Pierson.

If the assignment can be maintained, it must be on the ground of some equitable principle, not on the note simply. The defendants, therefore, seek to establish some equity through the alleged rights of defendant Pierson, and through his acts subsequent to the giving of the note; claiming to be subrogated to his rights or the rights of creditors of the firm.

On the death of one or two partners the assets of the firm vest in the survivor. But this does not take from the firm creditors their right to be paid out of the assets before any creditor of an individual partner in case of insolvency. (*Bulger v. Rosa*, 119 N. Y., 465.) If an insolvent firm, or if the surviving partner of an insolvent firm, should assign firm assets for the payment of an individual debt in preference to the debts of the firm, this would be a fraud under the statute of Elizabeth, and not merely a violation of the equitable rights of the firm creditors. (*Bulger v. Rosa, ut supra.*) And the plain reason for this is that the debt is the debt of only one partner, and not of the other, and such assignment takes property which belongs not solely to the debtor, but to himself and to another, who does not owe the debt. (*Wilson v. Robertson*, 21 N. Y., 587.)

And although by the death of one partner the assets vest in the other, still the same rights of firm creditors remain. A firm creditor would be defrauded by such a transfer, and after judgment and execution could have the assignment set aside. (*Haynes v. Brooks*, 116 N. Y., 487.) And this, too, even if the surviving partner and the assignee believed that the debt thus fraudulently preferred was a firm debt. (*Importers and Traders' National Bank of New York v. Burger*, 25 N. Y. St. Rep., 136.)

It is important to notice that in *Bulger v. Rosa* this rule is placed upon the statute of Elizabeth, and not on merely equitable principles. That is, it is a fraud upon firm creditors to assign firm property to pay individual debts before firm debts are all paid.

These principles are all so well settled that it has, perhaps, been unnecessary to cite authorities. For it does not seem to be claimed that the bank could have recovered upon this note in any way so as to reach the firm assets. But it is urged that the voluntary act of

the defendant Pierson, in giving the bank this preference, can be maintained. That is, that defendant Pierson can give what the bank could not obtain by any legal proceedings, namely, a preference of an individual debt over firm debts in respect to firm assets.

The defendants urge that on the death of a partner the surviving partner becomes owner, and may sell or mortgage the assets. (*Williams v. Whedon*, 109 N. Y., 338.) Hence, they say, he may give preference in an assignment.

Now, it is true, as held in that case, that the surviving partner, in performance of his duty of closing up the affairs of the firm, may sell assets, and may mortgage them to secure debts of the firm.

Thus it was said in *Bradford Commercial Banking Company v. Cure* (L. R., 31 Ch. Div., 324), cited by defendants, that the surviving partner can give a valid lien on property of the partnership by way of security for a debt incurred by the partners during the life of the deceased partner.

That qualification shows the limit of his power. The defendant Pierson could not lawfully have given security on assets of this firm to secure his individual debts. And the \$15,000 note was his individual debt.

The case of *Fitzpatrick v. Flannagan* (106 U. S., 648), cited by defendants, arose in Mississippi. The surviving partner was continuing the business, not winding it up. And in its decision the court cite a Mississippi case, holding that when one of the two partners, with the assent of the other, transferred the whole business and stock to a third person in payment of an individual debt, the transaction was not fraudulent as to creditors of the firm. We can hardly think that such is the law of this State. (*Bulger v. Rosa*, as before.)

But again it is urged by the defendants that, inasmuch as defendant Pierson used the moneys thus borrowed by him to pay firm debts, he was entitled to repay himself for this money out of the firm assets, and that the bank should be subrogated to his right.

Now, this view seems to assume that defendant Pierson was only a surety for the debts of the firm, and, therefore, that if he paid those debts he should be reimbursed. It is very true that a surety who pays the debt of a principal debtor is entitled to be reimbursed. He becomes the creditor in the place of the creditor whose debt he

has paid. But that rule does not apply to one of several joint debtors, or to the survivor of a partnership. He is not a surety for the debt. He is himself the debtor. If he pays a debt which he and his partner owe, such payment might give him a claim against his partner, or his partner's estate on final settlement, but could give him no claim upon the firm assets as against firm creditors.

Let us suppose that defendant Pierson, without borrowing from the bank, had taken his own money and with it had paid debts of the firm, he could not have repaid himself out of the assets. It would not have been unlawful for him to devote individual property to the payment of firm debts. (*Cook v. Rindskopf*, 105 N. Y., 476.) And the payment of the firm debts, which it was his duty to pay, would not entitle him to be indemnified therefor out of firm assets.

To make this more clear, suppose that, during the existence of the firm, defendant Pierson had, from his own funds, paid debts of the firm, thus entitling himself to credit as against his partner. If the firm afterwards became insolvent and made an assignment, this claim of one partner could not be paid before debts of the firm. It would be only a liability to be settled between him and his partner on a final adjustment of the business after all firm debts should have been paid. Or, in the present case, if defendant Pierson, before making the assignment, had paid this note from his individual funds, and then had directed the assignee to pay to him, Pierson, the amount thus advanced next after wages and expenses, there could be no doubt that the assignment would have been fraudulent.

It is true that in *Haynes v. Brooks* (8 N. Y. Civ. Pro. Rep., 106, 113) there is a remark that if a firm obligation was retired by the use of money loaned by Brown & Co., the surviving partner would have been entitled to be repaid out of the firm property. But Haynes, the plaintiff, was an individual creditor, and, therefore, had no ground of complaint. He had no right to preference in the firm property, and, therefore, could not maintain the action. That case was affirmed in 42 Hun (528) and in 116 New York (487). But in this affirmance no notice was taken of this remark, and the affirmance is on entirely different grounds. The case of *Fitzpatrick v. Flannagan*, supposed to favor the same view, has been already spoken of.

All the firm property and all the property of the partners individually are liable for the firm debts. And when a partner has paid a firm debt with his own funds, he can have no right as against firm creditors to be preferred. He has only devoted individual property to firm debts, as he may do. (*Cook v. Rindskopf, ut supra.*) And as said in that case at page 486 :

“The law would require, in the event of an assignment by a firm of two persons, that after the payment of firm debts the residue should be divided into two funds for the payment of individual creditors.”

Thus it is only after firm debts are paid that the residue can be applied, and then not to the individual partners, but to their individual creditors. But it is said that if defendant Pierson had not borrowed this money then, in his assignment he might have preferred those debts of the firm, which by means of this money he paid, and, therefore, it is fair that he should prefer the bank whose money enabled him to make such payment. But the difficulty with this view is that those debts were firm debts, contracted before the death of Pierson, senior, therefore he might prefer them if they were unpaid. But he could not prefer a debt created by him after the dissolution, because that was not a debt of the firm.

It is the right of every firm creditor that when an assignment is made the firm assets shall be applied solely to such unpaid debts as were owing before the firm ceased its existence. The assets must not be applied to debts since created ; nor must they be applied to pay again debts which have been paid already. The bank note is the individual note of defendant Pierson ; and there was no connection between the bank and these creditors who were paid by defendant Pierson. The bank did not purchase those claims and knew nothing about them. Defendant Pierson was under no obligation to the bank to apply the money he had borrowed to any specific objects. He could have used it for his own purpose or could have paid his individual debts with it. This money was not kept distinct. It was deposited in the general account, from which account \$20,000 were afterwards paid to the bank before the day when the assignment was made. The bank, therefore, in no way stands in the place of the paid creditors. (*Matter of Cavin v. Gleason*, 105 N. Y., 263.)

Those debts thus paid no longer exist ; for the money was paid to the creditors by the debtor, not by a surety. And there is no

indebtedness of the firm to defendant Pierson for what he had paid. Nor did he for such payment have any claim upon the assets of the firm until every existing firm debt had been fully paid and satisfied. We must bear in mind that the individual partners may lawfully prefer firm debts. (*Cook v. Rindskopf, ut supra.*) Therefore, the payment of firm debts by defendant Pierson, considering it as his individual payment, was lawful; and was not fraudulent as to his individual creditors. Whether or not the bank which loaned him the money can collect it from him does not affect the question before us. Defendant Pierson, if he had paid the bank this note from his individual money, could not have secured himself the repayment of the amount by a preference in the assignment over firm creditors. And as he could not have done this for himself, he cannot do it for his individual creditors. There is no hardship in this case other than that which always exists when a creditor makes a loan to one who proves to be unable to pay. The bank knew that the firm was dissolved. It knew that it was trusting the responsibility of defendant Pierson only, because it knew that Pierson, senior, was dead. It probably supposed the defendant Pierson to be solvent, and, therefore, made the loan.

Judgment affirmed, with costs.

MAYHAM, J. (concurring) :

If this debt, which was preferred under the assignment, was a firm debt, then it was allowable for the assignor to prefer it and direct its payment, as a preferred claim, out of the firm assets.

If, on the contrary, it was the individual debt of the surviving partner, then it could not be paid out of the firm assets until all the partnership debts were paid, and its preference would be a fraud upon the firm creditors.

The death of Henry R. Pierson, Sr., dissolved, *ipso facto*, the partnership, and no partnership transactions could be performed after that event.

The legal title to the assets of the partnership vested in Henry R. Pierson, Jr., and to the extent of the partnership assets he, as such survivor, became charged with the payment of the firm's liabilities. He could not charge or incumber such assets to pay or secure any debt contracted by him after such dissolution.

That being so, the debt contracted by him and the note given thereafter to the National Commercial Bank was necessarily his individual debt, and the note, although in form a partnership obligation, was an individual note, and the bank, having knowledge of the dissolution of the firm by the death of Henry R. Pierson, Sr., was charged, in law, with the knowledge of the survivor's inability to charge the firm by the execution of the firm note.

But it is urged that, as the firm creditors were paid out of this fund, and the gross amount of the firm debts were correspondingly reduced, such creditors are not injured by this preference, as the right to create preferences was inherent in the assignor, and he could have preferred those on whose debt this money was applied and the remaining creditors could not object.

If the surviving partner or the bank had paid this money as surety, the right to be subrogated would seem to be clear; but that is not this case.

A surviving partner who pays the debt of the firm does not occupy the relation of surety of the firm as to other creditors of it. He is the principal debtor, and in paying the debt of the firm, pays, as to other creditors of the firm, only his own debt. Then, after the partnership debts are all paid, in an accounting with the estate of the deceased copartner, he could be reimbursed out of his estate; but he could have no such claim against the other creditors of the firm, nor do we think he could be equitably reimbursed out of the firm property to the exclusion of the claims of other firm creditors, and to allow this preference would be indirectly extending to him that privilege. If he could not claim this immunity for himself, we do not see how he could voluntarily confer it upon his individual creditors by a preference in his assignment. As we have seen, his power to bind the property of the firm as partner had ceased, and his dealings with the Commercial Bank in negotiating this loan and giving this note must be regarded as his individual acts. As an individual he had a right to borrow money, and with it to pay partnership debts; but we do not see how that created any equity in favor of the bank against the partnership assets, especially as the bank was bound to know that his power to bind the partnership had ceased, and he was dealing with the bank as an individual, and not as a partnership.

Upon the principles which seem to underlie this case, and upon the authority cited by the learned referee, and those cited by my brother LEARNED, I am inclined to concur in his opinion, that the judgment entered upon the report of the referee should be affirmed.

LANDON, J. (dissenting):

This case does not depend upon the question whether the bank could recover the note against the survivor out of the assets of the firm estate, but whether the survivor could, under the circumstances, lawfully provide for its payment to the bank. It may be conceded that without the assignment the bank could not recover; but if before the assignment the survivor could have paid himself out of the firm property, it would not be a fraud for him to transfer by the assignment his right to the bank.

The note given by Pierson, the survivor, to the National Commercial Bank was his individual note, simply because the firm had ceased to exist. The property of the late firm by the death of the senior partner became the survivor's individual property. That is, his legal title to it was absolute and complete. (*Nehrboss v. Bliss*, 88 N. Y., 600; *Williams v. Whedon*, 109 id., 333.) Because of the insolvency of the firm the firm creditors had equities to prevent such a disposition of it by him as would operate as a fraud upon them. But, as shown in the case last cited, his absolute legal title gave him, for the purposes of the proper settlement of the firm business, absolute dominion over the property. Although the note which he gave the bank was his individual note, nevertheless, he gave it to obtain money to pay firm debts, and he did pay such debts with all the money which he obtained upon the note, except the portion which he refunded to the bank, thus reducing the amount of the note. He gave the note, therefore, in the course of the honest settlement of the business of the late firm. As the property was his for the purpose of settling the firm business, he gave the note for the same purpose and was protected in giving it by his ownership of the firm property. Because of that ownership he could, upon realizing the money upon the firm assets, reimburse himself in the amount of his private advances upon the firm debts, and, of course, with the money thus obtained pay the bank the amount due upon the note. The operation of paying firm debts from the proceeds of firm assets would then, and not until then, be complete with respect to the

debts paid from the proceeds of the note. No firm creditor could intervene to prevent such a completion of the transaction, because the completed transaction would have achieved an honest result and would in no way have operated as a fraud upon him.

The surviving partner as well as the firm creditor is entitled to have all the firm assets applied to the payment of the firm debts. True, he may pay the firm debts from his individual property, but when it is plain that he intended nothing of the kind, equity, which scorns trickery, will not impute such an intent to him. Equity will perceive the mistake under which he acted, and in the absence of estoppel or anything like it, will assist him in retrieving his mistake. Here the junior Pierson should be permitted to reimburse himself from the firm assets in the amount which he mistakenly paid upon the firm debts.

This was distinctly said in *Haynes v. Brooks* (8 Civil Pro. R., 106, 113), at Special Term. The case was affirmed (42 Hun, 528; 116 N. Y., 487), upon other grounds, but the proposition follows from the principles already stated. It was, in substance, so held in *Fitzpatrick v. Flannagan* (106 U. S., 648). Otherwise the firm estate would be so much the richer by the honest eagerness of the survivor to hasten the payment of the firm debts, and the survivor injured.

Assuming the right of the survivor to reimbursement from the firm assets, we proceed to consider whether he could not protect that right in the general assignment. By the assignment he directed the assignee to pay the bank out of the firm assets. The bank was the creditor of Pierson individually, but not as survivor. But it was competent for Pierson to direct that the reimbursement from the firm assets which was due to himself should be made to the bank, not in satisfaction of any debt from the firm to the bank, but in satisfaction of Pierson's lien upon the firm assets, or right to protection from them. Pierson, in effect, said to the assignee: Pay the bank, and thereby pay me. B owes A, and C owes B. B may direct C to pay A, and if C does it, both A and B are paid.

Moreover, the assignee should complete the work his assignor begun and left unfinished, namely, the payment of the partnership debts to Durant and others out of the firm assets. Pierson did not

go so far as to complete the payment out of the firm assets. He personally made the payment for the firm before he had realized upon the firm assets, and left the work of such realization and making the firm make the payment unfinished.

What the survivor could lawfully do he could lawfully direct the assignee to do, and the assignee, by obeying the direction, will simply complete the payment to Durant and others out of the firm assets.

The fact that the bank, before the direction in the assignment, had no equitable claim upon the firm assets, but only against Pierson personally, in no wise makes it fraudulent for Pierson to direct that the bank shall be paid instead of himself. It may be conceded that, without the assignment, no right of subrogation existed in favor of the bank to the property which protected Pierson in making the note. If Pierson had been surety for the firm in making the note, the bank would, if necessary for its protection, have been entitled to subrogation.

But every right which subrogation could confer in such a case Pierson has now attempted to confer by the assignment. The firm ought to pay Pierson or the bank, and Pierson has waived his right and directed that the bank should have the benefit of it. It is difficult to see wherein such an attempt to do justice is fraudulent.

Again, whether an assignment is fraudulent is usually a question of fact. When the dispositions made in an assignment are certain to result in defrauding a class of creditors, the law, assuming that every man intends the natural and obvious consequences of his acts, imputes the fraudulent purpose which is sure to be accomplished, and will not permit a jury to hold otherwise. But in this case it is respectfully submitted that the plaintiff's claim is unconscionable; that the bank's claim under the assignment is meritorious; that the survivor's preference to the bank is consonant with scrupulous honor, and that to carry out the assignment with respect to the bank is to do right.

The plaintiff's claim, if within the strict letter of the law, offends its spirit. Equity respects the substance rather than the name of a transaction. It should not condemn this assignment as fraudulent.

I advise a reversal of the judgments in both actions.

Judgment affirmed, with costs.

MURRAY N. RALPH, APPELLANT, v. LOREN D. ELDREDGE
AND OTHERS, RESPONDENTS.

Guaranty to pay all notes which should "prove to be uncollectible" — not enforceable until judgment and execution returned unsatisfied.

One partner sold to another the stock in trade of the partnership and received himself from his copartner certain notes, accounts and demands owing to the firm, and also received a bond conditioned that his partner would pay to him one-half of all notes, accounts and claims of the late firm assigned to him "that shall prove to be uncollectible, if any such there be."

Held, that no right of action arose upon the bond as to any claim until the same had been prosecuted to judgment, and an execution had been issued upon such judgment and returned unsatisfied.

APPEAL by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of St. Lawrence on the 5th day of December, 1889, after a trial before a referee.

John C. Keeler, for the appellant.

A. Z. Squires, for the respondent Eldredge.

V. P. Abbott, for the respondent Seymour.

LEARNED, P. J.:

The plaintiff and defendant Eldredge had been copartners. On the 25th of November, 1884, the firm dissolved; plaintiff sold to Eldredge the stock, and Eldredge conveyed to plaintiff his interest in the notes, accounts and demands owing the firm. At the same time Eldredge executed to plaintiff a bond, with defendant Seymour as surety.

The condition of the bond was that Eldredge should pay to plaintiff one-half of the amount of notes, accounts and claims of the late firm assigned by Eldredge to plaintiff, "that shall prove to be uncollectible, if any such there be," with interest from the date of the bond.

On the trial the plaintiff produced a list of claims which he claimed to be uncollectible, and testified, or offered to testify, as to each, that he was personally acquainted with the financial ability of each, and that since the assignment not one of them has had sufficient ability to pay the claim.

This testimony was objected to as incompetent, and the referee

so held. And the referee made his report that no right of action arose on the bond until the prosecution of the claims to judgment and the issue and return unsatisfied of execution thereon.

From the judgment thereupon entered the plaintiff appeals. The question here is, whether it was necessary for plaintiff thus to prosecute to judgment and execution before he could recover on the bond. That question must depend on the meaning of the condition of the bond. Because there is no other liability of either defendant to the plaintiff.

It seems to be settled in this State that a guaranty of collection is an undertaking to pay the sum of money guaranteed, provided the principal debtor is prosecuted to judgment and execution with due diligence, and the same cannot be collected of him. (*Northern Ins. Co. v. Wright*, 76 N. Y., 445; *Craig v. Parkis*, 40 id., 181.) The plaintiff urges that the bond does not guarantee the collection of these claims, but is only a contract to pay plaintiff one-half of the amount of those which should turn out bad. But the bond uses the word "uncollectible," and the question must be, what is the legal meaning of that word. That word has a definite meaning, as decided in the cases above cited. And that meaning should be here enforced.

The plaintiff urges that the amounts are small and it could not have been intended that they should be sued. But it would be incorrect to hold that "uncollectible" meant one thing as to small amounts and another thing as to large. The language "prove uncollectible" strengthens this view. Some process was in view by which it should be legally ascertained that the amounts were uncollectible. That process is prosecution to judgment and execution. The defendants might have bound themselves to pay half of such amounts as should not be voluntarily paid. But they did not do so. And as they were under no obligation to plaintiff except upon the bond, we think that he cannot recover without showing judgment and execution returned unsatisfied. To hold otherwise would be contrary to a familiar and settled rule of construction.

The judgment must be affirmed, with costs.

LANDON and MAYHAM, JJ., concurred.

Judgment affirmed, with costs.

THE STATE OF NEW YORK NATIONAL BANK, APPELLANT, v. SAMUEL D. COYKENDALL, RESPONDENT, IMPLEADED, ETC.

A party taking an accommodation note as collateral for a past-due check is not a bona fide holder for value—it does not extend the time of payment of the check.

A bank receiving an accommodation note, which has been diverted from the purpose for which it was intrusted to the payee, as collateral security for a past-due check, does not acquire the right of a *bona fide* holder thereof for value.

Railroad Company v. National Bank (102 U. S., 14) disapproved.

The taking of a note payable in the future, by a bank, as collateral security for a past-due check, does not extend the time of payment of the check, and thereby make the receiver of the note a *bona fide* holder thereof for value, in the absence of evidence of an agreement to extend such time of payment.

APPEAL by the plaintiff, the State of New York National Bank, from a judgment of the Supreme Court, entered in the Ulster county clerk's office, in favor of the defendant Samuel D. Coykendall against the plaintiff, on May 2, 1890; and also from an order denying the plaintiff's motion to set aside the verdict of the jury, in favor of the defendant Coykendall, and for a new trial made on the minutes of the court.

The action was tried at the Ulster Circuit before the court and a jury, at which a verdict was rendered in favor of the defendant Samuel D. Coykendall.

F. L. Westbrook, for the appellant.

A. T. Clearwater, for the respondent.

LEARNED, J. :

This is an appeal by the plaintiff from a judgment, entered on a verdict rendered for the defendant and from an order denying a new trial.

The action is to recover on a note of \$5,000 made by The Emerson Manufacturing Company, by F. A. Waters, treasurer, to the order of E. E. Waters, dated February 22, 1887, payable at six months. The indorsements are as follows :

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EDW'D E. WATERS,
43 *Park Place, New York.*

F. A. WATERS,
Kingston.

This last indorsement being erased by lines drawn through it.
S. D. COYKENDALL, *Kingston, N. Y.*

Pay to the order of
F. A. WATERS.
F. A. WATERS,
Kingston, N. Y.

The jury found a verdict for Coykendall and against the other defendants.

Francis A. Waters, had been cashier of plaintiff. On January 11, 1888, Charles W. Deyo was made such cashier, and Waters became clerk, acting as teller. About a week after Deyo became cashier he found among the cash items a check as follows:

[MEMORANDUM.]

“NEW YORK, *January 9, 1888.*

“North River Bank pay to the order of E. E. Waters, five thousand dollars.

“F. H. FORBES.”

Indorsed: E. E. WATERS.

It was counted as cash. He directed F. A. Waters to take it up. It had been put there by him. On the twenty-sixth of January Deyo was informed that Waters had directed a clerk to charge that check as a loan. Deyo then took the note in question as collateral to the check. The check remained still in the bank, until it was produced at the trial. Waters testifies that when the cashier was unwilling to accept the Forbes check, Waters said he would give them the note in question as collateral to the check. He further testifies that two or three months after the check was given (viz., in January, 1888), he gave notice to the bank about the collection of the check, told them he wanted them to collect it and that the cashier wrote to Forbes and received a reply.

This shows, as the cashier stated, that the check remained in the possession of the bank after the note was turned out as collateral

thereto. In connection with this we must refer to the testimony of Coykendall, which is that the note in question was indorsed by him at the request of Francis A. Waters, and that at the time Waters told him that he desired to use the note to take up other paper which Coykendall had indorsed for him.

The question raised by the plaintiff on this point of the case is, whether the taking of the note by the bank as collateral security for the check, gave the bank the right of a *bona fide* holder for value. The plaintiff relies on *Grocers' Bank v. Penfield* (69 N. Y., 502) and *Continental National Bank v. Townsend* (87 id., 8).

But the ground of the decision in these cases is that the accommodation note was held "without restriction as to the mode of using it." And the distinction is made between such cases and those in which "the note has been diverted from the purpose for which it was entrusted to the payee." In the latter class of cases an antecedent debt is not a sufficient consideration to make a person a *bona fide* holder for value, as against the party whose indorsement has thus been wrongfully diverted. (*Stalker v. McDonald*, 6 Hill, 93; recognized in *Grocers' Bank v. Penfield*, *ut supra*.)

It is well known that the Supreme Court of the United States holds a different view from that of the highest court of this State. (*Railroad Company v. National Bank*, 102 U. S., 14.) But we must follow our own decisions, and it is unnecessary to examine the cases in other jurisdictions; especially when our own rule has been maintained in late decisions. (See *Lawrence v. Clark*, 36 N. Y., 128; *Taft v. Chapman*, 50 id., 445; *Phoenix Ins. Co. v. Church*, 81 id., 218.)

It would seem that there could be no question that the note was indorsed by Coykendall for the specific purpose of meeting indorsements of his already existing. If that, however, were in dispute the matter was fairly submitted to the jury, and there is no ground to question the correctness of their decision. The note was not used to take up previous indorsements of Coykendall, but was used as collateral to an instrument on which he was in no way liable. This was a plain diversion of the note and brings the case within the rule above cited in our decisions.

It is urged by the plaintiff that the taking of this note by the bank as collateral to the Forbes check was an extension of time,

and hence that plaintiff is a *bona fide* holder for value. But no agreement to extend time was shown; and merely taking security as collateral does not extend the time of the principal debt, even if the security is payable at a day subsequent to the time when the principal debt became payable. Men very frequently borrow money for a month or two, giving as collateral railroad bonds, or the like, not payable for many years. But the time for payment of the debt is not thereby extended. There was a dispute of fact in this case, whether the indorsement of F. A. Waters, which was before that of Coykendall, had been erased before Coykendall signed, or was erased afterwards. This question was submitted to the jury.

There was also submitted to the jury the question whether this erasure, if an erasure was thus made, was made intentionally and fraudulently, or whether it was made by accident. The court charged, in substance, that if an erasure was made in a material part and fraudulently, Coykendall would be discharged. Now, in the charge on this point, it seems to us that the learned court was very favorable to the plaintiff.

It would probably not be claimed that a merely accidental and not intentional alteration of a note would render it void. As, for instance, if ink were accidentally spilled upon the note so as to efface a material part. But if the alteration is in a material part and is intentionally made, it is said that it is not necessary to show a fraudulent intent. When the intent is not fraudulent it would seem that the party may resort to the original indebtedness. (*Booth v. Powers*, 56 N. Y., 22; *Meyer v. Huneke*, 55 id., 412.) That right is of no consequence here, because there was no original indebtedness, since the indorsement was simply for accommodation. But here the alleged alteration was material. It released F. A. Waters from the position of prior indorser. It must have been intentional, because it was made by drawing lines across the name. Therefore, we see no error in the charge of the learned court injurious to the plaintiff. It is plain that if an alteration is made in an instrument affecting the rights of a signer thereto without his consent, he cannot be bound by the instrument. Because the instrument sued upon was never executed by him.

That the note in question was altered at some time or other is not questioned. The bank took it with these lines drawn through

F. A. Waters' name. If they had sued Waters as first indorser, he could have shown that his name was erased. And the mere fact that his name could still be read would not disprove the erasure.

There are some questions made as to the nature and effect of the Forbes check; as to the meaning of the word "memorandum." But we do not see that these questions affect Coykendall. The action was against all the parties to the note; but this appeal is only against Coykendall, who was successful on the trial.

The court held that if the maker of the check had no funds in the bank on which it was drawn, and was insolvent, the neglect of plaintiffs to forward the check for collection would not discharge the parties to the note.

The court charged the jury that if they came to the conclusion that the bank was guilty of neglect in not presenting the check in proper time, all the defendants in the action would be exonerated. The jury found for the plaintiff against all the defendants except Coykendall. Therefore, they could not have found that there was neglect on the part of the bank in not presenting the check. And they must have found that the check was a valid obligation. Therefore, it is not material on this appeal to inquire as to the correctness of the charge in respect to the neglect of the bank to present that check. The jury must have placed the verdict in Coykendall's favor on one or the other of the grounds previously discussed. We do not see any error in the case requiring a new trial on this appeal.

The judgment and order must be affirmed, with costs.

LANDON, J., concurred; MAYHAM, J., not acting.

Judgment and order affirmed, with costs.

GEORGE C. PRESTON, AS RECEIVER OF THE ULSTER
COUNTY AGRICULTURAL SOCIETY, RESPONDENT, v.
ROBERT LOUGHRAN, APPELLANT.

A corporation organized under chapter 425 of 1855, and chapter 394 of 1867 — power to mortgage its property to a director — enforcement of a mortgage foreclosure judgment against property in the hands of a receiver.

A corporation, organized under chapter 425 of the Laws of 1855, and chapter 394 of the Laws of 1867, has power to mortgage its property when authorized by a vote and by the consent of two-thirds of the stockholders.

The director of such a corporation is not prohibited from loaning money to it, and receiving from it security, in the form of a mortgage upon its property, for the repayment of the amount loaned, and under a foreclosure of such mortgage he may purchase in and obtain title to the property mortgaged.

While a party having a judgment, which is a lien upon property in the hands of a receiver, will not be permitted to take the property out of the possession of the receiver and sell it under an execution issued upon such judgment, yet a plaintiff, who has obtained a judgment of foreclosure of a mortgage, is differently situated and may sell the mortgaged property thereunder.

A judgment, in an action brought by the attorney-general to dissolve a corporation on the ground that it has suspended its business for more than a year, provided that "nothing in this decree contained shall be deemed in any way to prejudice the legal rights of Charles Burhans under the mortgage held by him, and under the decree of foreclosure and sale heretofore made in an action brought by said Charles Burhans to foreclose said mortgage; * * * nor shall it be necessary for the said Charles Burhans or the said Robert Loughran to bring said receiver as a party into their respective actions; nor shall this decree operate as a stay in either of said actions of said Charles Burhans and Robert Loughran."

Held, that this provision of the decree was a permission, if any was needed, to Burhans to sell the mortgaged premises under his decree of foreclosure of the mortgage.

APPEAL by the defendant Robert Loughran from a judgment of the Supreme Court, entered in the office of the clerk of the county of Ulster on the 9th day of May, 1890, in favor of the plaintiff, for the recovery of certain real property described in said judgment, and for the sum of \$300 for the rents and income thereof, and for the costs and disbursements in the action, after a trial at the Ulster Circuit before the court without a jury.

The judgment decreed that George C. Preston, receiver of the Ulster County Agricultural Society, recover of Robert Loughran,

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the defendant herein, the possession of the property and real estate described in the complaint.

F. L. Westbrook, for the appellant.

Charles A. Fowler, for the respondent.

LEARNED, P. J.:

This is an action of ejectment tried before the court without a jury. The property in question on or prior to June 6, 1874, belonged to the Ulster County Agricultural Society, a corporation organized under chapter 425, Laws of 1855, and the special provision of chapter 394, Laws of 1867.

On that day a meeting of the stockholders was held, and by a two-thirds vote it was resolved to mortgage the property to the amount of \$1,300, to pay existing debts. Such bond and mortgage to be executed by the president, secretary and treasurer of the society, or a majority of them. A written consent of the same date, signed by two-thirds of the stockholders, to the same effect was proved on the trial. The directors had voted to the same effect October 4, 1873.

Pursuant to authority herein given, a bond and mortgage, dated the 15th day of June, 1874, was executed, as authorized by said vote, by the president, secretary and treasurer, to Robert Loughran, the defendant, to secure \$1,300, payable in one year with interest. On the 13th day of July, 1887, Loughran assigned the bond and mortgage to Charles Burhans, the object of the assignment being to have the mortgage foreclosed. On the 10th day of August, 1887, Burhans commenced an action of foreclosure on the bond and mortgage against said society and other defendants.

The summons and complaint were duly served on the society by delivery to the president, and were duly served on the other defendants. The usual proceedings were taken on default, and a judgment of foreclosure and sale was granted October 8, 1887.

On the 4th day of November, 1887, the referee advertised, and on the 30th of June, 1888, sold the premises to defendant for \$1,600. His report was made, dated July 2, 1888, and was confirmed July 21, 1888. The referee's deed was executed and delivered to defendant, dated June 30, 1888.

This is an abstract of defendant's title. On the 15th of September,

1887, an action was commenced by the People against the Ulster County Agricultural Society to have the corporation dissolved on the ground that it had suspended its business for many years. No defense was made; and on October 8, 1887, a judgment was entered dissolving the corporation and appointing the plaintiff a receiver of the property. Under this judgment the receiver took possession of the books of the corporation. This judgment, which it will be seen was granted the same day with the aforesaid judgment, contained the following provisions:

“Nothing in this decree contained shall be deemed in any way to prejudice the legal rights of Charles Burhans, under the mortgage held by him, and under the decree of foreclosure and sale heretofore made in an action brought by said Charles Burhans to foreclose said mortgage.”

“Nor shall it be necessary for the said Charles Burhans, or the said Robert Loughran, to bring said receiver as a party to their respective actions, nor shall this decree operate as a stay in either of said actions of said Charles Burhans and Robert Loughran.”

On November 2, 1887, upon affidavits of Preston, the above plaintiff, and of his attorney, notice was given to the attorney of Burhans, of a motion for an order opening the foreclosure decree and allowing Preston, as receiver, to be let in to defend in the interest of all creditors and stockholders, and a stay of proceedings in the foreclosure action for twenty days was granted to enable Preston to make the motion. A reference was had to take evidence in said motion, and the motion was finally heard June 16, 1888, and was denied, with costs and disbursements to be paid out of the proceeds of the sale.

This, however, was without prejudice to Preston, receiver, to bring an action to recover for alleged claims asked to be set up as to the cause of action recovered by plaintiff in the foreclosure action. This order was made by the consent of Preston's attorneys. A reference to the affidavit of Preston shows what the claims are on which he was thus allowed to sue Loughran. His affidavit alleges that Loughran was an officer of the society; had been in receipt of all the income and had never accounted therefor. Of course, if true, this might show a counter-claim for moneys received which would have been available against the foreclosure.

And, as the court denied the right to come in and defend, it very properly declared that the decision should not prejudice his right to bring an action himself on these claims. Of course, the present action is not brought under that provision. For Loughran then had no title to the land, and ejectment against him was not contemplated in the order. It was also declared that the question of the validity of the mortgage was not passed upon.

This is an abstract of plaintiff's title to the land; that is, the plaintiff makes four claims:

First. That the society had no power to mortgage.

Second. That the complaint in the foreclosure avers an assignment to Burhans of the mortgage, but does not aver an assignment of the bond.

Third. That Loughran, being an officer of the company, could not buy for himself.

Fourth. That, after the appointment of plaintiff as receiver, the sale under the foreclosure was absolutely void.

The learned court held with the plaintiff on the third and fourth points.

The complaint in the foreclosure action was sufficient. The mere omission of the words "bond and" did not make the complaint invalid. It would hardly be demurrable; the meaning was plain. The assignment of the mortgage with the bond was on record July 29, 1887. The reference was to compute what was due on the bond and mortgage, and the referee reported accordingly, referring to the record of the assignment. The judgment was valid.

Next, as to the power of the society to execute the mortgage.

The general act, chapter 425, Laws of 1855, does not provide for stock companies. The payment of ten dollars makes one a life member, and the payment of fifty cents annually a so-called stockholder. But there is no capital stock. The power to sell land is to be obtained on application to the court after a vote at an annual meeting following a notice published for three months previous. But the society in question was organized into a stock company (chap. 394, Laws of 1867) with shares of twenty-five dollars each. And section 6 provides that, by authority of a vote of two-thirds, the officers might sell and dispose of the property of the society in the manner directed by such vote and distribute the same after payment of debts.

The section of the general act providing for an application to the court was, as to this society, superseded by this provision. And, inasmuch as the society had become a stock corporation, it was proper, unless some restriction appeared, that it should have control of its property, to sell and dispose of the same.

“Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money or their debts.” (*Carpenter v. Black Hawk Mining Company*, 65 N. Y., 43, 48.) “By the common law the power to alien and mortgage lands in the course of its business, inhered in corporations capable of acquiring and holding them, as in natural persons, as an incident of ownership.” (*Rochester Savings Bank v. Averell*, 96 N. Y., 467, 472.)

Whatever, then, may be the powers of societies organized under the general act, this society has no restriction placed upon its power to dispose of its property except the requirement of a vote of two-thirds. It owed debts and it borrowed the money in question to pay them.

In this case there was a vote of the directors, and subsequently, on due notice of the object, a two-thirds vote of the stockholders, and finally a written consent of two-thirds of the stockholders. We think that the society had the power to mortgage, and the proceedings therefor were regular. If there were any irregularity in those proceedings the society had the opportunity to set it up when it was sued in foreclosure, and no such defense was set up.

The next question is whether, on the sale under the foreclosure, Loughran could lawfully purchase on his own account. It might also be argued by the plaintiff, on the same general principle, that the mortgage could not properly have been made to Loughran. But the rule is decided adversely to the plaintiff in *Twin-Lick Oil Company v. Marbury* (91 U. S., 587, 589, 590). The director of a corporation is not exactly in the position of a trustee having the title to property held in trust for another. He has no title to the property of the corporation; the title is in the company itself. It is true he is in a position where he must manage the affairs of the corporation for its good. But he is not absolutely excluded from the right of dealing with it. He can loan money to it and become its creditor, and he can receive by the act of the corporation security for his debt.

If he has a mortgage security he may foreclose the mortgage, and it follows, almost of necessity, that if he can foreclose he may protect himself by bidding at the sale. Of course, if he takes any undue advantage, another question arises. But when his acts are fair and open they are not invalid. In the present case more than six months elapsed between the advertising and the sale. During this time the present plaintiff was carrying on his motion to open the judgment. He had abundant notice of the intended sale and could have bid for the property had he chosen to do so. There is no pretense that there was any actual fraud or unfairness in the purchase by defendant.

In the case of *Hoyle v. Plattsburgh and Montreal Railroad Company* (54 N. Y., 314), the Commission of Appeals stated, in the course of its opinion, that a director of a railroad company could not become a purchaser of property of the corporation, except subject to the right of the corporation to elect to disaffirm the sale and have a resale. But it was not said that the sale was void, only that the corporation might ask for a resale if they believed the property would sell for more. And it was further stated that where the director himself was the judgment-creditor, he had a clear right to sell the property of the corporation, and it was not decided that he might not then purchase in his own right.

Nor was it proved in this case that Loughran assigned to Burhans only for the purpose of foreclosure. Loughran had a subsequent judgment against the society, and was advised by counsel that for that reason he would better assign his mortgage. The foreclosure sale was then for his benefit as creditor.

In such a case he must plainly have a right to protect his interest, both under the mortgage and under the judgment, by bidding. Otherwise the property might be sacrificed. And he must have a right to bid for himself.

If the mortgagor, the society, should think that the property sold for too little, they might move for a resale. And perhaps, on such a motion, the court would consider the fact that the purchaser was an officer in the company. But the sale would be valid and could only be set aside in equity. (*Harrington v. Erie County Savings Bank*, 101 N. Y., 257.)

There remains to be considered the fourth question, whether a

valid sale could be made after the appointment of a receiver. The cases on which the learned court relied as establishing the negative are *Wiswall v. Sampson* (55 U. S. [14 How.], 52), and *Walling v. Miller* (108 N. Y., 173). Both of these were cases of a sale under the ordinary execution against property. To understand what the Court of Appeals decided we must quote a few words. There had been a levy under execution on property as personal. Two days afterwards a receiver was appointed. Afterwards a sale was made under the execution, and under that sale plaintiff claimed title. Still later the receiver sold and the purchaser took the property. The purchaser under the execution sale sued the receiver and the purchaser at his sale. The court said: "The lien of the execution was not destroyed by the appointment of a receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the court which appointed the receiver, and the property could not be taken out of the possession of the receiver and sold upon the execution without leave of the court."

"Persons having liens upon the property had no right to interfere with its possession by the receiver, and without any application or adjudication of the court sell and dispose of it and thus dissipate it and deprive the court of jurisdiction to administer it."

Now, the first thing to notice is that these remarks apply to executions on judgments. In the case of such executions there is no action of the court directing a sale of specific property. They are issued by the party on his own motion without any special authority of the court. A decree of foreclosure is very different. In that the court itself on hearing the facts of the case orders that the property be sold by a person appointed by the court. The judgment of the court that the property be sold is as authoritative as the judgment of the same court that a receiver be appointed. The mortgaged property is not sold "without leave of the court," but is sold by direction of the court. It is not sold "without any application or adjudication of the court," but is sold by the adjudication of the court. The plaintiff does not deprive the court of jurisdiction to administer, but administers under the judgment of the court.

We think, therefore, that a judgment of the court directing the sale of specific property and the sale thereunder do not come within

the condemnation applied by the court to ordinary executions issued by the party without special authority.

Suppose, for instance, that a mere judgment-creditor asked leave of the court to issue an execution, when a receiver had been appointed, and that the court granted leave, would not the sale be regular and valid? Now, when the court itself orders a sale of specific property by a person appointed by itself, is not that sale valid?

But the present case goes farther. The judgment appointing the receiver expressly refers to the judgment of foreclosure made the same day, and declares that the judgment shall not in any way prejudice the legal rights of Burhans under his decree of foreclosure and sale, and that it shall not be necessary to bring in Burhans as a party, and the decree shall not operate as a stay in the action of Burhans. What does this mean but a permission, if permission was needed, to Burhans to go on with his sale? His legal rights were to sell, and these rights are not prejudiced. The decree is not to operate as a stay. Then he may lawfully go forward. It would be unjust, after declaring that his rights are not prejudiced, and his proceedings are not stayed, when Burhans goes on in the faith of this provision and sells the property, then to hold that the sale was void; void, because made without the leave of the court. Such a construction is a fraud on Burhans. He was most emphatically told in the judgment which appointed the receiver that his own judgment in foreclosure was not stayed or prejudiced. And when the referee sells, as that foreclosure judgment directed, the court is asked to say that the act was an improper interference without leave of the court, and the sale was void.

Further still, the receiver afterwards obtained a temporary stay for the purpose of making his motion to open the judgment of foreclosure. The motion was made and denied. The temporary stay ceased with the denial of the motion (if not before). And again the court, by its order putting an end to the stay, allowed the foreclosure sale to go on. And yet the receiver says that the sale was "without leave of the court." If the court then thought that it was best to have the receiver sell, why did not the learned justice, who denied the receiver's motion, stay the proceedings in the foreclosure action on the grounds now urged by the receiver?

Both Burhans and the receiver were before the court on that motion, and if the present position of the receiver on this point was good, it might have been urged then. Or the court might have been asked, in its discretion, further to stay the proceedings in the foreclosure until the receiver could advertise and sell. Instead of that Burhans went on in good faith; and after the sale had been made and confirmed the purchaser has to meet the expense and trouble of this ejectment action. Another circumstance confirms this view. When the motion made by the receiver to open the foreclosure judgment was denied, an order was made by the consent of his attorneys. That order directed that the motion costs of Burhans and the fees of the referee who had taken evidence on the motion should be paid out of the proceeds of the mortgage sale, and they were so paid.

Now, here is again a recognition by the court, and a consent by the receiver's attorneys, that the property should be sold under foreclosure; and that the costs and disbursements which the receiver had caused, and for which, as the defeated party, he would ordinarily be liable, should be paid from the avails of that sale.

The judgment should be reversed and a new trial granted, costs to abide the event.

LANDON, J., concurred; MAYHAM, J., not acting.

Judgment reversed, new trial granted, costs to abide event.

IN THE MATTER OF THE APPLICATION OF THE ATTORNEY-GENERAL FOR A WRIT OF MANDAMUS ADDRESSED TO THEODORE W. MYERS, AS COMPTROLLER OF THE CITY OF NEW YORK, APPELLANT.

Duty of the Comptroller of the city of New York to issue revenue bonds to pay the proportion of the State tax chargeable to that city — no deduction is proper, of the tax on the amount added to the assessed valuation by the State Board of Equalization, nor of the amount raised in the State tax levy and not appropriated, nor of the amount of a deficiency in the city tax levy to meet such bonds.

In a proceeding, instituted for the purpose of obtaining a *mandamus* to compel the Comptroller of the city of New York to issue and negotiate Revenue Bonds, and from the avails thereof to pay to the Treasurer of the State the amount

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owing for State taxes from said city for the tax imposed in 1889, it is no defense to the Comptroller that the Board of Estimate and Apportionment of the city of New York, in December, 1889, deducted from their estimate of the amount which was to be raised by tax to meet such Revenue Bonds, that proportion of the tax which was imposed upon an amount added by the State Board of Equalization to the assessed value of real estate in the city of New York; and also that proportion of the State tax which, it was claimed, had been imposed to meet several items in the State appropriation bill, which, after its passage by the legislature, had been vetoed by the Governor.

The amount certified by the Comptroller of the State of New York for the State tax in the city of New York, cannot be changed by the Comptroller of that city and made to conform to the appropriation made by the Board of Estimate and Apportionment of that city for that purpose; and the Comptroller of the city of New York is obliged to issue sufficient revenue bonds to enable him to pay from the proceeds thereof the amount of the State tax, although the Board of Estimate and Apportionment has not provided a sufficient amount in the tax levied upon the city to pay them.

The Comptroller of the State of New York, under such circumstances, is not required to apply for a *mandamus* against the Board of Estimate and Apportionment to compel them to make a new assessment for a proper amount.

A law imposing a tax, which is otherwise valid, is not impaired or rendered invalid under section 20 of article 8 of the Constitution of the State of New York by the fact that the appropriation bills, by reason of their reduction by the veto of certain items thereof by the Governor, do not appropriate all the money which will probably be received under such tax.

APPEAL by Theodore W. Myers, as Comptroller of the City of New York, from an order made at a Special Term of the Supreme Court held in Ulster county, dated May 10, 1890, and entered in the office of the clerk of the county of Albany on July 28, 1890.

David J. Dean, for Myers, as Comptroller, appellant.

William A. Poste, for the Attorney-General, respondent.

LEARNED, P. J.:

This is a proceeding for a *mandamus* to compel the Comptroller of New York City to issue and negotiate revenue bonds, in order that from the avails thereof he may pay to the treasurer of the State \$5,685,660.41, alleged to be owing for State taxes from said city for taxes imposed in 1889. (Chaps. 309, 311, 335.)

Of this sum it appears that the sum of \$4,519,641.83 is not disputed, and it was conceded on the argument before the Special Term that this sum would be immediately paid. The brief of the defendant on this appeal states that since then it has been paid.

The residue may be conveniently divided into two sums, since the grounds on which payment of these sums is resisted are different; first, the sum of \$359,839.65 is the proportion of the State tax imposed on \$119,425,063, which is the amount added by the Board of Equalization of 1889 to the assessed valuation of the city of New York; second, the sum of \$818,767.41, is claimed to be the proportion of the State tax which was imposed by reason of certain items which were in the supply bill as it passed the legislature, but which were vetoed by the governor, and, therefore, never became valid.

The decision of the Special Term, as to the first of these sums, was that the affidavits of the defendant have put in issue the regularity of the proceedings of the Board of Equalization, and that a peremptory writ of *mandamus* would not issue. An alternative writ was ordered. As to the second, the Special Term ordered a peremptory *mandamus*. The Comptroller appeals from the whole of the order, but the argument has been directed to that part which ordered a peremptory *mandamus*.

Chapter 309, above mentioned, imposes a tax of twenty-three one hundredths of a mill for canal purposes. Chapter 311 imposes a tax of one mill and eighty-one one hundredths of a mill for the general fund; three-tenths of a mill for canal purposes and ninety-seven one hundredths of a mill for school fund. Chapter 335 imposes a tax of twenty-one one hundredths of a mill for the canal sinking fund. These make an aggregate of three mills and fifty-two one hundredths of a mill. This required a levy of State tax on the city of New York for the fiscal year beginning October 1, 1889, of \$5,685,660.41.

When the board of estimate and apportionment acted in December 31, 1889, instead of including the above amount in their estimate, they deducted two sums, viz., that proportion of the tax which was imposed on the sum of \$119,425,063, the amount added by the State Board of Equalization to the assessed value of real estate in New York, making \$359,839.65; and also that proportion of the State tax which is alleged to have been imposed on account of several items in the State appropriation bill, which did not become valid because vetoed by the governor. (See chaps. 569, 570 of the year 1889.) Those items are stated to amount to \$1,808,550.13, for which the tax would be \$818,767.41.

The State tax is by law payable, one-half on the fifteenth of April, and the other half on the first of May; that is, the taxes now in question would be payable on those days in 1890.

In the city of New York, however, as appears by chapter 410, Laws of 1882 (§§ 814, 817, 833, etc.), the assessment-rolls are delivered to the receiver of taxes the first of September, and taxes are then payable. Such rolls, therefore, cannot include the State tax to be levied for the fiscal year beginning with October first next succeeding. Hence it is that, practically, the payment of the State tax is, in New York city, about a year behind. For the purpose of meeting this difficulty it is provided by the law last cited, in section 153, that to enable the city to make payment of its quota of the State tax at the proper time, the Comptroller of the city shall issue revenue bonds, and from the proceeds pay the tax, and the amount thus paid shall be levied in the then next annual levy.

One point urged by the appellant is, that the Comptroller cannot be compelled to issue revenue bonds and pay the State tax for any amount in excess of the sum which has been appropriated by the Board of Estimate and Apportionment and levied for that purpose. But the statement above made shows that this cannot be correct. This State tax was to be paid on or before May 1, 1890. And the duty of the Comptroller to issue bonds for that purpose arose before that day. The appropriation by the Board of Estimate and Apportionment in respect to that tax could not lawfully change the amount certified by the Comptroller of the State. For the board is to include the amount necessary to pay the State tax (§ 189). Section 154 gives a general authority to the Comptroller of the city to anticipate its revenues to meet expenditures under the appropriation. But section 153 is specific; and it not only authorizes, but it requires the Comptroller to issue revenue bonds, and from the proceeds to pay the State tax.

It is true that, by the refusal of the Board of Estimate and Apportionment to put in their final estimate the proper amount, there will not be raised "in the then next annual levy" enough to meet these revenue bonds. But we think that the neglect of certain officials to do their duty should not prevent the Comptroller of the city from doing his. If the Board of Estimate and Apportionment had a discretionary power to determine how much should be paid to the

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State for its tax, the question would be very different. But that determination belongs to the Comptroller of the State. (Laws 1859, chap. 312, §§ 8 and 9, as amended by chap. 351, Laws of 1874.)

It is undoubtedly true, as urged by appellant, that if the State tax could be paid only from money already collected and in the hands of the Comptroller of the city, and if such money had not been collected, *mandamus* would not lie. But in the present case the Comptroller of the city has the power to raise the money and the statute requires him to do so. Therefore, payment is in his power.

The appellant urges that by section 9, last cited, the remedy of the Comptroller of the State is by *mandamus* against the Board of Estimate and Apportionment to compel them to make a new assessment. That would probably be his remedy if it were not for the peculiar provision authorizing the Comptroller of New York city to issue revenue bonds and from their avails to pay the tax. If it is his duty to do this, then it will be for the Board of Estimate and Apportionment, under section 190, to provide for the payment of these obligations of the city. We think, therefore, that this first objection against the *mandamus* is not valid.

The next point is that the legislature had no constitutional power to raise money by tax for items in the supply bill which were subsequently vetoed by the Governor.

This argument assumes as its basis that the tax of one mill and eighty-one hundredths of a mill for the general fund and for those claims and demands which shall constitute a lawful charge upon that fund, imposed by chapter 311, would raise exactly the amount afterwards appropriated from the general fund by chapters 569 and 570 as they passed the legislature; and, therefore, would raise more than enough to meet the appropriations of those acts as they finally became laws. This was assumed by the Board of Estimate and Apportionment. But we see no proof. It may be that a calculation of the amount which would be produced by this tax would show it to be in excess of the total of appropriations made in those bills. But as there is no evidence as to the condition of the bills when they passed the two houses of the legislature, we cannot assume that this tax would have produced exactly the amount of the appropriations then contained in those bills. Nor is there even any evidence as to the amount of appropriations vetoed by the governor.

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But passing this difficulty we come to appellant's argument. He urges that, by article 3, section 20 of the Constitution, every law imposing a tax shall distinctly state the tax and the object to which it is to be applied. The tax in question states that it is for the general fund "and for the payment of those claims and demands which shall constitute a lawful charge upon that fund during the fiscal year," etc.

The only question is whether that states the object to which the tax is to be applied. That is settled in the affirmative in *People ex rel. Burrows v. Supervisors of Orange* (17 N. Y., 235). That decision and the subsequent constant practice of the legislature must be deemed conclusive. A contrary construction would produce great embarrassment, as is well pointed out in the opinion then delivered.

Now, if this law is valid under the Constitution, its validity is not impaired by the failure of the legislature subsequently to appropriate all of the money which would probably be received under the tax. Yet that is the appellant's argument. He urges that because the legislature did not, by a valid law, appropriate all the money which (as he says) this tax will raise, therefore, the law imposing the tax is invalid. Or, rather, he says that the City of New York may compute how much of the law imposing the tax is valid and how much is invalid. For the city does not object to paying a part of the amount imposed by this chapter 311 for the general fund. That is to say, the City of New York may determine that the tax of one mill and eighty-one one hundredths is valid only to the extent of about one mill and thirty one hundredths of a mill.

This is the position of the appellant. Because he proposes to reduce the tax which the city is to pay, on this ground (exclusive of the other proposed reduction), to what would be produced by a tax for the general fund of about one mill and thirty one hundredths of a mill, in addition to the tax for schools and canals. It seems to us that this evidently cannot be done. The legislature must be permitted to levy such tax for the general fund as it determines to be necessary. And though it fails to appropriate a part of the money which it may be supposed will be thereby raised, such failure does not make the law imposing the tax void wholly or fractionally.

It may be noticed that the session of 1889 ended May sixteenth, and that all the bills which have been above referred to were approved by the governor subsequently to that date. But this does not affect the argument as to the constitutionality of the act imposing a tax.

The order is affirmed, with fifty dollars costs and disbursements.

LANDON and MAYHAM, JJ., concurred.

Order affirmed, with fifty dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.*
GEORGE W. VAN HISE *v.* THE BOARD OF POLICE
COMMISSIONERS OF THE VILLAGE OF GREEN-
BUSH AND THE MEMBERS OF SAID BOARD.

Policeman — when tried entitled to counsel.

A policeman, tried upon charges before a board of police commissioners, is entitled to have counsel.

CERTIORARI to review the proceedings of the Board of Police Commissioners of the Village of Greenbush, Rensselaer county, New York, taken May 27, 1890, for the removal of the relator from the position of superintendent of the police department and dismissing him from the police force.

Eugene Burlingame, for the relator.

James H. Ryan, for the Board of Police Commissioners, respondent.

LEARNED, P. J. :

The relator was the Chief of Police of the Village of Greenbush. Proceedings were had prior to May, 1890, before the board of police commissioners, by which the relator was removed from his office. At the term of this court, held in May, 1890, those proceedings were reversed. Notice of the order was given to the attorney of the board May twenty-third. On the evening of that day the board met and reinstated the relator as Chief of Police.

At the same meeting two of the commissioners filed charges against him, and the board at once suspended him pending the hearing of the charges. On the twenty-seventh day of May the board again removed the relator after a hearing of evidence to support the charges, or some of them. On the hearing the relator, in person and by his counsel, claimed the right to be heard by counsel on the trial of said charges. This was refused by the board. The board also refused to permit counsel for the relator to be present at the hearing. Thereupon the counsel, in obedience to the order of the board, retired from the room where the trial was to be had, followed soon after by the relator, and neither relator nor his counsel were present at the trial. The relator now brings the writ of *certiorari* to review the proceedings. The principal ground is the refusal to permit the relator to appear by counsel. The relator, however, insists, in addition, that while there were six distinct charges, against the relator, and he was found guilty of all, there was no evidence whatever as to three of the charges.

The question as to the right to have counsel on such a hearing was before this court in *People ex rel. Campbell v. Hannan* (56 Hun, 469); and it was there decided that it was the right of a policeman on such a hearing to have counsel. It is not necessary for us to go over the argument for that decision. The counsel for the defendant cites *People ex rel. Flanagan v. Board of Police Commissioners* (93 N. Y., 97). The principal question in that case was whether the testimony could be taken before one commissioner. And while the court said that the board was not confined to strict legal rules, they held, in regard to the case before them, that the board "publicly heard the proofs and allegations;" that "the case was fairly heard, the right of the relator fully protected." Nothing was decided as to the right to appear by counsel. In the present case the matter was not publicly heard. Every one was excluded except the board, their attorney, the witnesses, the relator and the stenographer.

The statute under which the relator was appointed (Laws 1870, chap. 701) provides that policemen shall hold office during good behavior, but may be removed on proof of charges for cause preferred in writing. He has, therefore, a legal right to the office.

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Removal deprives him of a valuable possession. It was evidently thought by the legislature that it was best that the board should not have an arbitrary power of removal.

The right to appear by counsel is almost necessary to a fair trial. The testimony of witnesses who cannot be cross-examined is very often unfair, to say the least. Truth is ascertained only when the knowledge of the witness has been sifted by cross-examination. We see no reason to change the views stated in the case above cited.

Proceedings reversed, with fifty dollars costs and disbursements.

LANDON and MAYHAM, JJ., concurred.

Proceedings reversed, with fifty dollars costs and disbursements.

JENNIE LANGLOIS, APPELLANT, v. THE CITY OF
COHOES, RESPONDENT.

Bridge railing—giving way when leaned against—liability of the city to the party injured—statutory width of streets not applicable to a bridge.

In an action to recover damages for injuries sustained by the plaintiff in falling from a bridge, which had been accepted as a public highway by the city of Cohoes, it appeared that on the northerly side of the bridge there was a railing against which the plaintiff leaned, whereupon it bent around to the north and the plaintiff fell into the river.

Upon the trial the court granted a nonsuit on the ground that the defendant's duty was limited to the erection of a railing which would render the bridge reasonably safe for public passage, and for such things as were incident to public passage, and that the plaintiff, in leaning against it, was putting the railing to a use for which it had not been designed.

Held, that the nonsuit was improper; that a man, who instead of walking across a bridge pauses for a moment and rests upon its railing, does not lose his right to protection against the negligence of the party charged with its maintenance, and that it was the duty of the city of Cohoes to maintain upon the bridge a railing sufficient to meet all those incidental uses to which it would reasonably be put by persons crossing the bridge, certainly so far as concerned their leaning against it. It was claimed by the city of Cohoes that, by statute, the streets of the city must be sixty feet wide; that the bridge was only thirty feet in width, and that the city, consequently, had no right to accept it.

Held, that the statute referring to streets and highways did not embrace bridges.

APPEAL by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of Albany on the 25th day of January, 1890, after a trial at the Albany Circuit before the court and a jury, at which the plaintiff was nonsuited.

The action was brought to recover damages alleged to have resulted to the plaintiff by reason of her falling into the Mohawk river from a bridge in the city of Cohoes, the railing of which gave way when leaned against by her.

P. D. Niver, for the appellant.

C. J. Buchanan, for the respondent.

LEARNED, P. J.:

This is an action to recover damages for injury to plaintiff, caused by her falling off a bridge which crosses the south waters of the Mohawk. The plaintiff was nonsuited at the circuit and appeals.

The bridge was originally private property. On the 10th of March, 1886, the common council of the city voted that this bridge be accepted and declared open to public travel. The bridge is thirty feet wide inside, including the sidewalk, which is five feet wide. On the northerly side of the bridge there had originally been a railing of three iron pipes running through posts eight feet apart. The first pipe was a foot above the bridge, the second a foot above that, and the third a foot above the second.

In March, 1887, a freshet took away the iron post at the extreme westerly end of the bridge, together with the top rail between that post and the next. There remained two rails which, it would seem, being about sixteen feet long, passed through the first post which remained standing and into the next. The west end of the upper rail of the two which remained rested on a wooden post. The plaintiff had been accustomed to cross this bridge three or four times a day for a few years.

On the evening of March fifteenth, about seven o'clock, she was going from the city across to the island by this bridge and came to the westerly end. She there met three girls and stopped to talk. While they were talking two young men, Mort and Nolan, came from the opposite direction and joined them. After talking a little while the plaintiff sat down on the top rail near to its west end;

Maria Peat sat down next to her, Mort next and Nolan next to him. After sitting there a short time the plaintiff got up and went in front and spoke to Mort. She then turned and went back to the place she started from and put her hand on the railing. It bent around to the north and she fell into the river with all the others.

This is the account given by one witness. The plaintiff does not state that she had sat on the rail, but says that she was leaning against it with her hand upon it, and it sprang out and they all fell in. At the close of the plaintiff's case the defendant moved for a nonsuit on thirty-one grounds. The court granted the nonsuit on the ground that the defendant's duty was limited to the erection of a railing which rendered the bridge reasonably safe for public passage and for such things as are incidental to public passage, and that the plaintiff was putting it to a use for which it was not designed. The plaintiff appeals. As the plaintiff is entitled to the most favorable view, we must assume that she had not been sitting on the rail, but had been standing by it, leaning against it and resting her hand thereon. The learned justice in nonsuiting relied upon *Stickney v. Salem* (3 Allen, 374) with the similar cases of *Richards v. Enfield* (13 Gray, 344); *Orcutt v. Kittery Point Bridge Company* (53 Me., 500); *Stinson v. Gardiner* (42 id., 248); *Peck v. Ellsworth* (36 id., 393). .

Now, in regard to the cases in those States, it is to be noticed that there the liability of towns is statutory, while with us the liability is held to arise at common law. To show the difference, we may refer to *Stinson v. Gardiner* (*ut supra*), holding that where children used a part of the public road for play, the town is not liable for injury sustained by defects in the road. With this we may compare *Kunz v. Troy* (104 N. Y., 344), where the city was held liable for injury to a child playing in the street, caused by the fall of a counter placed on the sidewalk for sale. In *McGuire v. Spence* (91 N. Y., 303) this difference between the law of some other States and that of our own, in respect to highways, is mentioned.

In that case a child returning from school joined others in their amusement of jumping the rope. While so engaged she fell into an open area. It was held that the fact that she was playing, instead of simply passing along the street, did not prevent a recovery. (See *McGarry v. Loomis*, 63 N. Y., 108.)

Now, the doctrine which holds that the same duty of a city which exists as to travelers exists also as to a child playing in the street, applies by analogy to this case. The man who, instead of walking with unresting and undeviating step across a bridge, pauses for a moment and rests against the railing, does not lose his right to protection against negligence, any more than does the child who plays in the street instead of walking sedately home.

In *Orcutt v. Kittery, etc* (*ut supra*) the captain of a company, to which plaintiff belonged, called a halt upon a bridge. Plaintiff leaned his back against the railing to rest and wait for further orders. As he sprang forward to take his place in the ranks, the rotten railing broke and he fell off the bridge.

It was held that it was for passengers only that the corporation was obliged to maintain the railing, and that he could not recover; that his use of the railing was unauthorized. If that is the law of this State, the nonsuit was proper. But we think that such is not our law.

The railing of the bridge should be sufficient to meet all those incidental uses to which it would reasonably be put by persons crossing. We say nothing about sitting on the rail. We speak merely of that leaning against it, which is the common act of a person stopping a moment for any purpose on the sidewalk of a bridge.

The learned justice excluded the idea of contributory negligence, and placed the nonsuit on the ground that the defendant was not liable because the plaintiff was putting the railing to an unauthorized use. We cannot agree with this view.

The defendant urges further that, by statute, the streets of the city must be sixty feet wide, and that this bridge is only thirty, and, therefore, the city had no right to accept it. Evidently the statute cited refers not to bridges, but to streets and highways, strictly so-called, because it speaks of opening, working, laying out and grading; expressions not applied to a bridge.

The defendant further urges that defendant had no right to construct or keep a bridge over this branch of the Mohawk, and would have been a trespasser in going on the bridge to make repairs. This position rests on the cases of *Carpenter v. Cohoes* (81 N. Y., 21) and *Veeder v. Little Falls* (100 id., 343). But these are quite different from this. There it was held that the city was not bound to

go upon an approach to a bridge and put a railing thereon, where the approach and the bridge were State property.

Now, in this case, Adams built this bridge in 1876 from an island owned by him to vacant land on the west side of the south branch of the Mohawk. He sold building lots on his island, and houses were built thereon. People used the bridge in crossing from his island to the other part of the city.

The bridge was within the city limits. In 1886, as above stated, the common council passed a vote accepting this bridge and declaring it open to public travel. After the freshet of 1887, above mentioned, the street superintendent repaired the bridge, putting in new floor timbers. His attention was then called to this defective railing.

Whether the State might not cause this bridge to be removed we need not say. It had been allowed to remain some twelve years, and had been used by the public during that time. The case comes within that of *Sewell v. Cohoes* (75 N. Y., 45).

The judgment should be reversed and new trial granted, costs to abide the event.

LANDON and MAYHAM, JJ., concurred.

Judgment reversed, new trial granted, costs to abide event.

PETER J. FLINN, RESPONDENT, v. THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, APPELLANT.

Railroad company — right of, to run trains on any of its tracks, although the track used is immediately adjoining a dwelling-house and its use is peculiarly prejudicial thereto.

The owner of a lot, one end of which abutted upon land used by a railroad company for its tracks, brought an action against the company, alleging that he had a house on the said lot; that the railroad, after it had been in operation many years, had constructed two additional tracks upon its land, which brought its tracks very near to the plaintiff's house; that sparks and smoke were thrown into the windows, and that the house was finally set on fire and so much injured as to be practically destroyed; that the defendant, the railroad company, drew heavy freight trains up this part of its road where the grade was very steep, and

that such trains were frequently "stalled," and that in the effort to draw such heavy trains great showers of sparks were thrown out; and that there was an unlawful interference with his rights in laying the additional tracks near his house.

Held, that whether the railroad company should run its freight trains on one track or on another, or on the track nearest to plaintiff's house, was a question to be decided by the company itself, and that the jury had no right to say that the use of one or the other track was a negligent or improper use thereof.

That the company might lawfully lay its tracks on any part of the lands owned by it, and that, in the absence of further proof of negligence on its part, it was not liable for incidental damages arising from the location of its tracks.

That the fact that the defendant ran long and heavy freight trains on the track nearest plaintiff's house, and that more than one engine was sometimes required for running those trains, was no evidence of negligence on its part, nor was the fact that at times trains were "stalled" thereon.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Albany on the 11th day of November, 1889; and also from an order of the court denying a motion for a new trial, entered in said clerk's office on the 18th day of October, 1889, after a trial before the court and a jury at the Albany Circuit, at which a verdict was rendered in favor of the plaintiff for the sum of \$1,600.

Hale & Bulkley, for the appellant.

E. Countryman, for the respondent.

LEARNED, P. J. :

The rear end of plaintiff's lot abuts on lands used by the defendant for its tracks. This land was purchased or procured by the city of Albany, for the purpose of enabling the defendant (or defendant's predecessor) to build thereon its tracks; and it was leased by the city to the defendant (or its predecessor) for that purpose.

It is still so held and used, defendant having a perpetual lease. Although thus leased and used, a part of the land is generally called Railroad avenue. But this is a mere local designation. It is not a street or a highway; but it is only, as above stated, property leased by the city to the defendant (or defendant's predecessor), in accordance with certain statutes for its tracks. The plaintiff's deed bounds his land upon the land conveyed to the defendant's predecessor for the track of their road.

When plaintiff bought his land in 1867 there were but two tracks. Two additional tracks were laid in 1874. There were houses which fronted on this so-called Railroad avenue, and the occupants passed up and down on this land to get to Van Woert street and Broadway. The plaintiff had a house on the end of his lot abutting this so-called Railroad avenue. His claim is, that since the construction of the two additional tracks, which brought the tracks near to his said house, sparks and smoke have been thrown into the windows; the house has been set on fire, and finally that the house was so much injured in 1884 as to be practically destroyed.

The plaintiff claims that the defendant drew heavy freight trains up this part of the road where the grade is very steep and that such trains were frequently "stalled," and that in the effort to draw such heavy trains great showers of sparks were thrown out to his injury. He also claims that the defendant was negligent in not using the best spark-arrester. It will be seen from the pleadings, the case and the briefs of counsel that the plaintiff did not rest his ground of action simply on the usual ground in such cases, that the defendant was negligent in using imperfect engines. He claimed also that there was an unlawful interference with his rights in laying the additional tracks near his house. Hence is apparent the appropriateness of certain requests made by the defendant to the court.

The defendant's counsel asked the court to charge that the fact that the defendant used the track nearest the plaintiff's building for freight trains, instead of using some other track for that purpose, is no evidence of neglect. The court declined and said that they had a right to use their property as they pleased, and it is for the jury to say whether that was an improper or negligent use of it.

There is nothing in this case to show that defendant was not authorized to lay additional tracks. The fact that when the property was first acquired by the city for the railroad company the intention of the company was to lay a double track is not the least evidence that the company might not lay four tracks if it chose. And certainly when business increased it was the right, if not the duty, of the company to increase its facilities. Whether the company should run its freight trains on one track or on another was for it to decide. Running such trains on the track nearest to plaintiff's house was no evidence of negligence.

The jury had no right to say that that was a negligent or improper use of the track. The land belonged to the company for the purpose of laying its tracks, and it might lawfully lay its tracks on any part. It had the right by statute to run its engines on its tracks, and to lay its tracks on the land it had lawfully acquired. It is not liable for incidental damages unless it is shown that such damages are occasioned by its negligence. We cannot see how negligence can be predicated, in respect to an abutting or adjacent owner of land from the fact that the railroad company placed its track on one part or on another of its own land, acquired for the purpose of laying its tracks.

Cases are cited by the plaintiff's counsel where heaps of combustible material have been placed or allowed to remain on the land of the railroad company, and have caught fire and caused injury to adjacent property. But such cases are not analogous to this. It is no necessary part of defendant's business to leave heaps of combustible material on its land. But it is a necessary part of its business to lay tracks and to run cars over those tracks. The land in question and the whole width of the land were procured for that business and may lawfully be used therefor.

To say that negligence could be imputed to the company for laying its tracks near to the boundary line of its land would deprive it of the lawful use for which the lease was acquired.

Again, the defendant's counsel asked the court to charge that the fact that the defendant ran long and heavy trains on the track nearest plaintiff's building, and that more than one engine was sometimes required for running the train, was no evidence of any negligence on the part of the defendant. The court declined and defendant excepted.

We think the defendant was entitled to that charge. A good deal of stress was laid on the fact that heavy freight trains were run on this track; that more than one engine was sometimes needed; that at times trains were "stalled," that is, could not move. It was, therefore, important that the charge thus requested, if correct, should have been made.

It cannot be negligence, as to adjacent owners, that the defendant should run long and heavy trains. How long and how heavy a

train should be must be a matter for the railroad to decide. And the mere fact that trains were long and heavy and needed two engines could be no evidence of negligence.

The court had charged that if defendant "wantonly overloaded their trains and you (the jury) believe it was an imprudent manner of using trains over land and their own property by overloading the trains, perhaps they would be liable." This was excepted to by defendant.

We do not see any evidence that there was a wanton overloading. If it was meant that willfully, and in order to injure plaintiff, the defendant had overloaded its trains, possibly defendant might be liable for such a wrongful act. But nothing of that kind is shown. The utmost that is shown is simply that sometimes the trains were heavy and became "stalled" at this place and needed more than one engine.

It does not appear that there was any carelessness in making up trains, or that the person who attended to that business was incompetent or anything other than the mere fact that trains were sometimes heavy and were sometimes "stalled" on this steep grade. It was not correct to permit the jury to predicate negligence on this fact alone.

It is a common observation that rails may at times be slippery so that it is difficult for engines to move. Some one must judge as to the proper number of cars to be placed in a train, and if unforeseen causes should show the train to be too long, there would not necessarily be evidence of negligence in respect to the adjacent owners of land.

Whether there was any ground for recovery on account of imperfect spark-arresters we need not discuss. The jury were permitted to find negligence from other circumstances than the alleged defect in the spark-arresters and from circumstances which, as we think, could not legitimately show any negligence whatever.

The judgment and order should be reversed and new trial granted, costs to abide the event.

LANDON, J., concurred; MAYHAM, J., not acting.

Judgment and order reversed, new trial granted, costs to abide event.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, v. BENJAMIN RYALL, RESPONDENT.

SAME v. SAME.

What is not an omission to perform his duty by a public officer, within the meaning of section 154 of the Penal Code.

One Ryall, the superintendent of public works of Saratoga Springs, was indicted for having willfully omitted to make oath and execute an affidavit that he had not been interested pecuniarily in any contract, work, materials or other matter connected with his official duties, as prescribed by chapter 257 of the Laws of 1874, before receiving a portion of his salary or compensation provided for by section 5 of that act.

The indictment was found under section 154 of the Penal Code, which provides that "where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor."

Held, that chapter 257 of the Laws of 1874 required the making of the oath, not in the defendant's official, but in his personal, capacity, and that the omission to make the oath was his individual, and not his official, omission.

That the law did not require the defendant to make the oath, but left it optional with him, suspending his right to receive a salary until he should do so.

That the wrong done by the defendant consisted not in the omission to take the oath, but in his receiving his salary before his right to receive it was complete.

APPEAL by the People of the State of New York, from a judgment rendered at the Court of Sessions, in and for the county of Saratoga, on the 28th day of May, 1890, sustaining demurrers interposed by the defendant to two indictments charging that the defendant, being the superintendent of public works in and for the village of Saratoga Springs, willfully omitted to make oath and execute an affidavit that he had not been interested pecuniarily in any contract, work, materials or other matter connected with his official duties, as prescribed by chapter 257 of the Laws of 1874, before receiving a portion of his salary or compensation, as provided for by section 5 of said chapter 257 of the Laws of 1874, as such superintendent of public works.

The first indictment contains one count and recites that the grand jury "accuse Benjamin Ryall of the crime of willful omission to perform a public duty enjoined by law upon a public officer com-

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mitted as follows: The said Benjamin Ryall, on the fifth day of February, in the year of our Lord one thousand eight hundred and ninety, at the town of Saratoga Springs, in the county of Saratoga aforesaid, being the superintendent of public works in and for the village of Saratoga Springs, Saratoga county, New York, duly appointed by the trustees of the village of Saratoga Springs, and as such, being a public officer and a person holding a public trust and employment, willfully omitted to make oath and execute an affidavit that he had not been interested pecuniarily in any contract, work, materials or other matter connected with his official duties as prescribed by chapter 257 of the Laws of 1874, before receiving a portion of his salary or compensation provided for by section 5 of said chapter 257 of Laws of 1874, as such superintendent of public works, to wit, the sum of two hundred dollars received by him on that day, contrary," etc.

The second indictment consists of two counts, the first of which is in the same words as the above, except that the omission is charged with respect to his salary received on the 12th day of August, 1889. The second count is, in substance, the same as the first, except that his appointment to and acceptance of the office are more fully set forth.

T. F. Hamilton, district attorney, for the appellant.

John Foley, for the respondent.

LANDON, J.:

The indictments are under section 154, Penal Code, which is as follows: "Omission of duty by public officer. — Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor."

The office of superintendent of public works for the village of Saratoga Springs is created by chapter 257, Laws of 1874. His duties are prescribed by the act and are substantially as follows: He has charge of all the streets, sidewalks, alleys, bridges, culverts, etc., and if they are out of repair, it is his duty to fix them. It is his

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duty to remove all obstructions from the streets, etc., to report to the board of trustees the condition of such streets, etc., and to do many other things connected with the streets, and he shall be personally responsible to the public for neglect of duty to the same extent as the commissioners of said village. He has a salary of \$800.

The duty which he is charged with omitting is described in section 6: "Section 6. Before said superintendent shall receive any portion of his said salary or compensation, he shall make oath and execute an affidavit that he has not in any manner been interested pecuniarily in any contract, work, materials or other matter connected with his official duties, as prescribed by this act; which oath or affidavit shall be filed with the receiver of taxes and assessments of said town or village."

The indictments charge no omission of duty with respect to the streets. The only omission charged is the omission to make the oath and execute the affidavit prescribed in section 6. The making such oath and executing such affidavit cannot be done in an official capacity, but must be done by the defendant in his personal capacity. It is his conscience that is challenged. As an individual he knows whether as an officer he has done anything forbidden, and as an individual he must make oath. The omission to make the oath was his individual not his official omission. The law does not require the defendant to make the oath and execute the affidavit. It leaves that optional with him, and suspends his right to receive his salary until he shall make the oath and execute the affidavit. It follows that the wrong done consisted in defendant's receiving his salary before his right to receive it was complete. If that is a crime, it is not the one of which he is accused.

The judgments should be affirmed.

LEARNED, P. J., and MAYHAM, J., concurred.

Judgments affirmed.

THE VILLAGE OF BALLSTON SPA, APPELLANT, v.
CHARLES A. MARKHAM, RESPONDENT.

License to sell meat in a village—penalties for selling without a license, authorised by section 8, title 8 of chapter 291 of 1870.

In an action to recover three penalties of ten dollars each, alleged to have been incurred by the defendant because on three different days he peddled meat in the village of Ballston Spa, not having obtained a license therefor, it appeared that the plaintiff, the Village of Ballston Spa, was incorporated under the general act for the incorporation of villages (Laws of 1870, chap. 291), and that its board of trustees had passed the following ordinance: "All persons within the corporate limits of this village who shall hawk or peddle meat * * * in any of the streets of this village shall pay a license" of thirty dollars therefor, and had also prescribed a penalty of ten dollars for selling without a license.

Held, that the ordinance was authorized by section 8 of title 8 of said chapter 291 of 1870.

That this ordinance tended to restrain and prevent the hawking or peddling of meat; and that although it also imposed a tax it was not, therefore, prohibited. That the matter was of a purely domestic character, and that the power exercised was valid and within the constitutional competency of the legislature.

APPEAL by the plaintiff, the Village of Ballston Spa, from a judgment of the Saratoga County Court, entered in the office of the clerk of the county of Saratoga on the 21st day of September, 1889, reversing and setting aside a judgment theretofore rendered in a Justice's Court in favor of the plaintiff; also from an order of the Saratoga County Court, entered in said clerk's office on the 21st day of September, 1889, reversing and setting aside, with costs, the judgment of the Justices' Court herein.

The action was brought to recover thirty dollars from the defendant, that being the amount of three penalties for the violation of an ordinance enacted by the plaintiff, which required hawkers and peddlers of meat to pay a license of thirty dollars.

These penalties were alleged to have been incurred by the defendant because, on three different days, he peddled meat in the village of Ballston Spa without having obtained a license therefor.

The plaintiff was incorporated under the general act for the incorporation of villages, chapter 291, Laws of 1870, and the acts amendatory thereof. Its board of trustees passed and promulgated the following ordinances: "Sec. 34. All persons within the corporate

limits of this village who shall hawk or peddle meat * * * in any of the streets of this village shall pay a license therefor as follows: Hawkers and peddlers of meat, thirty dollars. * * * Licenses here mentioned, when issued, shall continue in force for one year." Section 35 prescribes a penalty of ten dollars for selling without a license. Various other licenses are in like manner provided for. The evidence showed that the defendant violated the ordinance and the plaintiff recovered judgment for thirty dollars and costs before the justice, which judgment, upon appeal, was reversed by the County Court.

J. W. Verbeck, for the appellant.

W. J. Miner, for the respondent.

LANDON, J.:

The learned county judge reversed the judgment of the Justice's Court upon the ground that the license fee here exacted by the ordinance, thirty dollars, was too excessive to be regarded as a reasonable police regulation for the protection of life, health or property, or for the promotion of good order; that it must, therefore, be considered as a tax, and that the legislature had not conferred upon the village the power to tax occupations for the purpose of producing revenue, or, at most, for any greater revenue than would defray the expense incident to granting the license.

We think the statute authorized the board of trustees to pass the ordinances in question establishing the price of the license, prohibiting peddling meat without a license, and fixing the penalty for each violation. Section 3 of title 3 of the village general act (2 R. S. [8th ed.], 967, chap. 291, Laws of 1870), provides that "the trustees shall have power, as to acts and matters within the corporate bounds, to make, publish, amend and repeal rules, ordinances and by-laws for the following purposes:"

Subdivision 22. "To restrain, regulate or prevent hawking and peddling in the streets; to regulate, restrain or prohibit sales by auction, and grant licenses to peddlers and auctioneers and fix the amount to be paid therefor," amended by chapter 281, Laws of 1878.

Subdivision 27. "The board of trustees shall have power to make and establish all legal by-laws, rules and ordinances necessary to

carry out the purposes of this act * * * and to enforce such by-laws, rules and ordinances. * * * The trustees shall also have power to prescribe penalties for a violation thereof not exceeding \$100 for each offense."

Section 9, article 8 of the Constitution provides: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, * * * so as to prevent abuses in assessments and contracting debt."

It is plain that the above legislative grants of power are within the Constitution, and are ample in their terms to embrace the ordinances of the village of Ballston Spa above cited. Undoubtedly the ordinance must be within the legislative grant of power or it is void. Here the power is "to restrain and prevent hawking and peddling in the streets," and "to grant licenses to peddlers, * * * and fix the amount to be paid therefor." Any one could peddle meat upon paying for the license.

In *City of Brooklyn v. Nodine* (26 Hun, 512) it was said that the power to regulate and license does not carry the power to tax. We need not question this. Here the power with respect to peddlers is to restrain and prevent and to license. The license fee exacted tends to restrain and prevent. It is also a tax, but it is not, therefore, prohibited. It is competent for the law to provide that a peddler who enjoys the benefits of the trade of a village shall contribute something in discharge of its burdens. Cases are cited in which ordinances designed to confer arbitrary power upon the authorities to do injustice to a class because of race or religious prejudices have been condemned. In *Yick Wo v. Hopkins* (118 U. S., 356) the Chinese were discriminated against. In *Austin v. Murray* (16 Pick., 121), the Roman Catholics. These have no application. Cases cited in which, under a false pretense of promoting health or good order, oppressive burdens have been imposed, do not apply. Nor do the cases cited from the Supreme Court of the United States, in which it has been held that a license imposed by State authority upon a non-resident trader of the State because he was a non-resident, was void; or upon a trader because he dealt in the productions of other States; or upon merchandise because it was imported from other States. These were attempts by the

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State to invade the exclusive power of congress to regulate commerce among the States, or to prevent interstate commerce from being free.

The matter here is purely of a domestic character, and the power exercised is valid because authorized by the legislature within its constitutional competency. (*Village of Carthage v. Frederick*, 33 N. Y. St. Rep., 383; *Village of Deposit v. Pitts*, 18 Hun, 475; *People ex rel. Dorr v. Thacher*, 42 id., 349; *City of Brooklyn v. Breslin*, 57 N. Y., 591; *People ex rel. Larrabee v. Mulholland*, 82 id., 324.)

The answer raises no issue as to the incorporation of the village. The judgment of the County Court should be reversed, with costs.

LEARNED, P. J., and MAYHAM, J., concurred.

Judgment of County Court reversed and that of justice affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. JOHN BELKNAP, APPELLANT.

Action for penalties under the law to protect fish — the authority of the proper officer must appear.

An action to recover penalties imposed for violating the laws for the protection of fish (secs. 23, 24, chap. 584 of 1879; chap. 127 of 1884 and chap. 11 of 1886), cannot be brought in the name of the people unless it appears that such action was brought by authority of the proper officer.

It cannot be presumed that any officer authorizes an action in which his name does not appear, and in which his authority to bring it is not claimed.

Such an action is a penal action, and the statutes authorizing it must be construed and pursued strictly.

The people have no capacity to sue for penalties, except as authorized by law, and not then except through the officer or person authorized to bring the suit.

APPEAL by the defendant John Belknap from a judgment of the Supreme Court, entered in the office of the clerk of the county of St. Lawrence on the 22d day of October, 1889, with notice of an intention to bring up for review, upon such appeal, an order, entered in said clerk's office on the same day, denying the defendant's motion for a new trial made on the minutes of the court, and the ruling and exceptions to defendant's motion for a dismissal of the complaint.

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The action was brought to trial at the St. Lawrence Circuit, before the court and a jury, and a verdict was rendered in favor of the plaintiff for \$200.

The action was to recover several penalties of twenty-five dollars each for violating the laws for the protection of fish.

The summons and complaint were not signed by any district attorney, and there was no allegation or claim that the action had been commenced under the direction of any fish or game protector or other officer.

Whitney & Whitney, for the appellant.

R. E. Waterman, for the respondent.

LANDON, J. :

The defendant incurred the penalties to the amount of the verdict. The point which he raised by his answer and motions for the dismissal of the complaint is that this suit against him in the name of the People of the State of New York as plaintiff, was not shown by the complaint or otherwise to have been brought under any statutory authority, and that without such authority and a compliance with it the people have no capacity to sue, and no attorney or individual has the right to use their name as party plaintiff. Neither the complaint nor the evidence showed by what authority the people were made plaintiff.

Undoubtedly, the People of the State of New York have the capacity to sue, (1) where enabled to do so by statute; (2) where the property or pecuniary rights vested in the people of the State are involved. But in either case such a suit must be brought by some officer or person duly authorized by law to use the name of the people as a party plaintiff. As was said in *People v. Ingersoll* (58 N. Y., at page 17), "such a committal of power should be the act of the legislature, who can hedge it about with all necessary safeguards." Again, "whenever the legislature, by statutory enactment, has conferred upon State officers or public bodies authority to represent the body of the people in the exercise of any prerogative right no question can arise, for in those matters, except as restrained by the Constitution, the legislature is supreme." (See *People v. Fields*, Id., 491; *People v. Booth*, 32 N. Y., 397.) Following the *Ingersoll*

and Fields cases, chapter 49, Laws of 1875 (now Code Civil Pro., §§ 1969 *et seq.*), conferred upon the people of the State the right to bring such actions as were defeated in those cases, and conferred upon the attorney-general the power to bring them. The Code of Civil Procedure, sections 1893, 1894, provides that when a penalty is given by statute to an individual he can sue for it in his own name. When the penalty is given to the people the attorney-general or district attorney must bring the action. (Id., § 1962.) These general provisions do not supersede special provisions of the statute authorizing actions for penalties in special cases, but they indicate the policy of the State, that no one shall use the name of the people of the State as a party plaintiff except in pursuance of some enabling law.

It is urged that this is not a question of the capacity of the people of the State to sue, but one of authority. But the people of the State are in this respect unlike an individual or domestic corporation. An individual not laboring under disability has a capacity to sue in whatever action he chooses to bring in his own name, however unsound his cause of action may be. So of a domestic corporation. But the people have no such general capacity. They have no capacity to sue for penalties except as authorized by law, and not then except through the officer or person authorized to bring the suit. If the proper agency is absent, the capacity is absent. In fact the people, as a body aggregate, under a constitutional government, are practically in ward, the public officers being their guardians. The people, strictly speaking, have no capacity to use their own name, the proper officers use it as the law permits. Hence the name of the people as party plaintiff in an action brought by an unauthorized attorney, simply as "plaintiffs' attorney," is the name of a party without capacity to sue in that suit, and without capacity to sue for the penalties therein specified, except upon the condition precedent lying at the foundation of its capacity, namely, that it shall be brought into court by the proper agent of the law. But whether the defect is one of capacity or of authority, this action, if either defect exists, is not maintainable. If, without authority, the action rests upon usurpation, and the defendant is punished, in the name of the people, when they have not moved against him.

The penalties in question were incurred under sections 23, 24,

chapter 534, Laws of 1879. Section 23 was amended by chapter 127, Law of 1884, and section 24 by chapter 11, Laws of 1886. Section 33 of the act of 1879, provided that "all penalties imposed by this act may be recovered, with costs of suit, by any person in his own name;" and the district attorney was also authorized to bring actions for their recovery in the name of the people. We have examined all the statutes subsequently enacted to which we have been cited, especially chapter 591, Laws of 1880, and chapter 317, Laws of 1883, the provisions of which relative to the bringing of actions, were expressly repealed by section 10, chapter 577, Laws of 1888; also, chapter 429, Laws of 1886. Chapter 577, Laws of 1888, makes it the duty of the game and fish protectors to enforce the laws of the State for the protection of game and fish. They are authorized to direct the commencement of suits for the purpose.

Section 3. "Such suits shall be commenced on the order of any game and fish protector, in the name of the people, by any district attorney where the offense shall be alleged to have been committed, or by the district attorney of an adjoining county. * * * If it shall appear in any case that the business of the office of the district attorney of any county where suits may be thus commenced is so pressing that the district attorney cannot give to such suits prompt and necessary attention, the game and fish protector having authority to direct the prosecution may, with the approval of the chief game and fish protector, employ other counsel in the same county to commence and conduct such suits to termination." It may be that, under section 2, chapter 429, Laws of 1886, game constables, sheriffs and deputy sheriffs have the same powers in this respect as game protectors.

As the law stands, an individual may bring the suit in his own name, and, of course, at his own expense. District attorneys may bring the suits in the name of the people, either upon their own motion or upon the direction of the proper officer. Counsel, other than the district attorney, may in the exceptional cases mentioned in chapter 577, Laws of 1888, bring such actions in the name of the people. But no presumption can be entertained that this action was authorized by the proper officer. We cannot presume that any officer authorized an action in which his name does not appear and his authority is not claimed.

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This is a penal action and the statutes authorizing it must be construed and pursued strictly. As the record stands, the case never had any lawful existence, and, of course, could not result in a lawful judgment against the defendant. (*Seward v. Beach*, 29 Barb., 239.)

Judgment is reversed, with costs.

LEARNED, P. J., and MAYHAM, J., concurred.

Judgment and conviction reversed.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, v. WILLIAM H. COUGHTRY, RESPONDENT.

Change of venue— not prohibited in an action for penalties under the game law, chapter 577 of 1888.

The provisions of section 8 of chapter 577 of the Laws of 1888, relating to suits for the recovery of penalties for violations of the game law, to the effect that "such suits shall be commenced on the order of any game and fish protector, in the name of the people, by any district attorney, where the offense shall be alleged to have been committed, or by the district attorney of the adjoining county, and such suits shall be prosecuted to determination in the county where they shall be commenced, unless for a good cause appearing a discontinuance shall be directed by the chief game and fish protector," do not prevent the Supreme Court from changing the venue in actions where the convenience of witnesses or the ends of justice demand it.

APPEAL by the plaintiff, the People of the State of New York, from an order made at a Special Term of the Supreme Court held in Albany county on the 26th day of August, 1890, and entered in the office of the clerk of the county of Columbia on the 2d day of September, 1890, changing the place of trial in the above-entitled action from the county of Columbia to the county of Albany.

The order was made upon a motion to change the place of trial for the convenience of witnesses and for the promotion of justice.

A. B. Gardenier, for the appellant.

F. M. Danaher, for the respondent.

LANDON, J. :

The action is for the recovery of penalties for alleged violations by the defendant of the game laws. The violations are alleged to have been committed in the county of Albany. The action was brought by the district attorney of Columbia county, and the place of trial laid in that county. The appellant's sole contention is that, under the statute, the court had no power to change the place of trial. Section 3 of chapter 577, Laws of 1888, provides that "such suits shall be commenced on the order of any game or fish protector, in the name of the People, by any district attorney where the offense shall be alleged to have been committed, or by the district attorney of an adjoining county; and such suits shall be prosecuted to determination in the county where they shall be commenced, unless for good cause appearing a discontinuance shall be directed by the chief game and fish protector."

Unquestionably, the intent of the legislature was to authorize, in proper cases, these actions to be brought in a county adjoining that in which the violation of the law occurred, but we do not think the legislature, by the provision, "and such suits shall be prosecuted to determination in the county where they shall be commenced," intended to deprive the Supreme Court of the power to change the place of trial from the adjoining county to the county where the alleged offense occurred. The jurisdiction to change the venue in actions where the convenience of witnesses or the ends of justice demand it, is ancient and useful. The learned counsel for the respondent points out in his instructive brief its antiquity, and the bench and bar would probably unite in attesting its usefulness. The Constitution (art. 6, § 6) confers upon the Supreme Court "general jurisdiction in law and equity." The eighth section of the same article provides that "except as herein otherwise provided, the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity that they have heretofore exercised." The power "to alter and regulate" implies that the old jurisdiction shall in some degree continue in an altered or regulated form. Many cases affirm the inability of the legislature to abridge the general jurisdiction of the court. (*De Hart v. Hatch*, 3 Hun, 375, 380; *People ex rel. Hill v. Supervisors*, 49 id., 481; *Brooklyn v. New York*, 25 id., 612; *People ex rel. Mayor*

v. *Nichols*, 79 N. Y., 590; *Alexander v. Bennett*, 60 id., 206; *Popfinger v. Yutte*, 102 id., 42; *Hutkoff v. Demorest*, 103 id., 380.)

Ordinarily an action to recover a penalty must be tried in the county where the cause of action arose. (Code Civ. Pro., § 983.) Where the legislature authorizes such actions to be brought in another county, the propriety of the jurisdiction of the court to change the place of trial to the county where the cause of action arose, if justice requires it, would seem to be clear. A legislative attempt to deprive the court of it would be an attempt to replace judicial functions with legislative mandates.

We need pursue the subject no further than to say that we decline to impute to the legislature an intention, by the use of the language here employed, to deprive the court of its accustomed jurisdiction. The real intent of the act is manifest when the whole provision is read: "Such suits shall be prosecuted to determination in the county where they shall be commenced, unless for good cause appearing a discontinuance shall be directed by the chief game and fish protector." The main intent is to prevent a discontinuance except under the direction of the chief game and fish protector. If there had been an intention to abridge the jurisdiction of the court, we think it would not have been disguised under an enlargement of the powers of this officer.

Order affirmed, with ten dollars costs and disbursements.

MAYHAM, J., concurred; LEARNED, P. J., taking no part.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
THE AMERICAN SURETY COMPANY v. EDWARD
WEMPLE, COMPTROLLER OF THE STATE OF NEW YORK.

Insurance company — when a “surety company” is an insurance company and subject to a tax on its premiums.

The American Surety Company, incorporated under chapter 463 of the Laws of 1853, and chapter 485 of the Laws of 1879 amendatory thereof, is an insurance company, although not so designated in its name, and is subject to the tax of eight-tenths of one per cent on the gross amount of its premiums under section 5 of chapter 361 of the Laws of 1881.

The provisions of section 4 of chapter 679 of the Laws of 1886, to the effect that the personal property, franchises and business of all insurance companies shall be exempt from taxation, except as provided in that act, are limited to fire and marine insurance companies, and do not apply to the American Surety Company.

CERTIORARI to review an adjustment and assessment of taxes made by the comptroller of the State of New York upon the relator, August 11, 1890, under the corporation tax law. (Laws of 1881, chap. 361, § 5.)

John J. Crawford, for the relator.

I. H. Maynard, for the respondent.

LEARNED, P. J.:

The relator is incorporated under chapter 463 of the Laws of 1853 and amendatory acts. The second part of the first section of that act, as amended by chapter 485, Laws of 1879, includes companies for guaranteeing the fidelity of persons holding places of public or private trust. And that is the business of the relator, as appears by its certificate.

It is quite clear, then, by the relator's own certificate, and by the statutes above cited, that it is an insurance company, although it does not so designate itself in its name. But the statutes mention the guaranteeing fidelity as one branch of insurance for which companies may be incorporated.

Section 5 of chapter 361, Laws of 1881, imposes a tax of eight-tenths of one per cent of gross amount of premiums of every insurance company, except life insurance companies and purely mutual

beneficial associations. This relator is not one of the excepted companies, and is, therefore, liable to the tax, unless relieved by some other statute. The relator relies on chapter 679, Laws of 1886, section 4. The latter part of that section provides that the personal property, franchise and business of all insurance companies shall be exempt from taxation, except as provided in the act. Hence the relator claims to be exempt from the tax above mentioned.

The relator's conclusion is correct, if that section really includes all insurance companies. To understand its meaning we must examine the whole act. The title is "An act to provide for the taxation of fire and marine insurance companies." Thus the object, as expressed in the title, is limited to fire and marine insurance companies.

Section 1 enacts that every fire and marine insurance company shall pay a tax of one-half of one per cent on the gross amount of its business.

Section 2 enacts that every such insurance company shall make an annual return of the amount of its premiums.

Section 3 imposes a penalty on any officer of a company required to make such return who neglects to do so, and gives an action to recover the tax.

Section 5 declares the taxes imposed shall be paid into the treasury for account of the general fund.

Section 4 begins by declaring that "the lands and real estate of such insurance companies shall continue to be assessed and taxed," etc. Then follows the clause relied on by the relator, "but the personal property, franchise and business of all insurance companies incorporated under the laws of this State or any other State or country * * * shall hereafter be exempt from all assessment or taxation, except as in this act prescribed."

Now, no argument is needed to show that this act has reference only to fire and marine insurance companies. The very section 4 begins by stating that the lands and real estate of such, that is, fire and marine insurance companies, shall be assessed and taxed. This, of course, has no reference to such a company as the relator. Then it proceeds, "but the personal property, franchise and business of all insurance companies," etc. Now, although the word "such" is

omitted before the words insurance companies, yet the meaning is plain.

The statute was dealing solely with fire and marine insurance companies, and its provisions apply to those companies only. This is made more plain by the latter part of this section where it says "shall hereafter be exempt from all assessment or taxation, except as in this act prescribed."

No assessment or taxation is prescribed in the act for any insurance companies other than fire and marine. When, therefore, the act declares that companies shall be exempt from all assessment or taxation, except as in the act prescribed, it evidently referred only to those companies for which assessment and taxation were prescribed by the act.

The final clause of the section enforces this view. It provides that the section shall not affect the fire department tax. This is a tax which has nothing to do with such companies as the relator. We think there is no question as to the meaning of the statute. The language of all the sections points plainly to fire and marine insurance companies as the only subjects of the legislation. It substituted a new rate of taxation in respect to those companies for previous rates. Having done this, it exempted those companies (except as to land) from other taxation. But it did not establish any new rate of taxation for such companies as the relator, and did not exempt such companies as the relator from other and existing taxation.

Whether the word "such" was omitted by stratagem or by accident, or whether the person who drafted the statute thought its meaning sufficiently clear without that word we do not know.

But we have no doubt that the action of the comptroller was legal and correct, and his proceedings are confirmed, with fifty dollars costs and disbursements.

LANDON and MAYHAM, JJ., concurred.

Proceedings of comptroller confirmed, with fifty dollars costs and disbursements.

ANNA L. GREER, APPELLANT, v. THOMAS H. GREER
AND OTHERS, RESPONDENTS; BARRINGTON LODGE AND
ANOTHER, EXECUTORS OF WILLIAM B. SCOTT, DECEASED,
APPELLANTS.

Evidence as to a personal transaction with a person, since deceased, as to his having been present — privileged communication to an attorney — stipulation as to objections.

To state the names of the persons in a room at a certain time is not testimony concerning a personal transaction between the witness and one of them, and such testimony is admissible, although the witness may be interested in the action and one of the parties who was in the room has died before the trial.

The testimony of an attorney that he drew a deed for one Scott and took his acknowledgment, and that the description in the deed embraced a certain parcel of land, is not a privileged communication where it appears that the deed was drawn, executed and acknowledged in the presence of the grantee.

A stipulation "that all objections and exceptions to evidence be considered as taken by all the parties whose interests are antagonistic to that of the party offering the evidence, and that all available objections, under sections 829 and 835, were taken, and when overruled, that exceptions were taken," is not available on an appeal.

APPEAL by the plaintiff Anna L. Greer, and also by the defendants Barrington Lodge and William W. Crannell, as executors of the last will and testament of William B. Scott, deceased, from so much and such parts of a judgment of the Supreme Court, entered in the office of the clerk of Albany county on the 7th day of February, 1890, as decreed:

XII. That said parcels of land secondly and thirdly described in the complaint herein were conveyed by said William B. Scott to said defendant Thomas H. Greer, by deed dated November 21, 1885, duly executed and acknowledged on that day and delivered to said Greer, and at the time of the death of said Scott he had no title thereto or interest therein; nor had the plaintiff any title thereto either as tenant in common with said Thomas H. Greer, or otherwise, or any interest therein, other than an inchoate right of dower, as the wife of said defendant Thomas H. Greer, at the time of the commencement of this action.

XIII. That the complaint herein be and the same hereby is dismissed as to the second and third pieces or parcels of land described

therein, and that the defendant Thomas H. Greer recover of the plaintiff Anna L. Greer the sum of \$ as his costs and disbursements herein.

William B. Scott, the father of the plaintiff, had been the owner of the two parcels. He died in February, 1867. By his will he devised all his real estate to the plaintiff and to her husband, the defendant Thomas H. Greer, as tenants in common. The plaintiff brought this action to partition the lands so devised, alleging that the two parcels were included. The defendant Thomas H. Greer answered claiming to be the sole owner of the two parcels. Upon the trial he introduced testimony tending to show that the testator William B. Scott, on the 21st of November, 1885, conveyed the same to him by deed; that the deed was delivered to him and placed in his safe, and was not recorded; that Scott had access to his safe; that the deed was abstracted therefrom or lost or destroyed. The referee decided that he was the sole owner of the two parcels.

Alden Chester, for the plaintiff, appellant.

W. Frothingham, for the executors, appellants.

D. C. Herrick, for the respondents.

LANDON, J.:

We think this judgment should be affirmed upon the facts, unless alleged errors in the admission of incompetent evidence materially affecting the issue require a reversal.

It was an important question upon the trial whether a deed which, it was shown by evidence satisfactory to the referee, embraced the two parcels in question, and was executed and acknowledged by Scott on the 21st day of November, 1885, was delivered to the defendant by Scott. It was shown that on that day Scott and Greer were together in the office of Mr. Frothingham, who with Mr. Crannell was also present. A judgment for \$23,400 had been recovered against Scott in an action in the Supreme Court, and Mr. Frothingham was his counsel with respect to an appeal. Greer was to become one of the sureties upon the undertaking upon appeal. The undertaking was then executed by Greer. Mr. Crannell, who was an attorney and notary public, taking Greer's acknowl-

edgment. At the same time Crannell, at the request of Scott, drew the deed of the two parcels of land in question and Scott executed it and Crannell took his acknowledgment. Greer's claim was that Scott did this in order to enable Greer to justify as one of his sureties upon the undertaking. Greer had previously owned the two parcels of land, and in 1883 had conveyed them to Scott. The defendant Greer was permitted to testify substantially as follows: I was present when the acknowledgment was taken; Scott, Crannell and Frothingham were present when I got possession of the paper (deed); I got possession of it immediately after it was acknowledged; I took it home; had it in my safe.

It is important to ascertain how much of this testimony was objected to. There is a statement in the case in these words: "It is stipulated that all objections and exceptions to evidence be considered as taken by all the parties whose interests are antagonistic to that of the party offering the evidence, and that all available objections under sections 829 and 835 were taken, and, when overruled that exceptions were taken." We do not think that that stipulation is available for any purpose on this hearing. In *Briggs v. Waldron* (83 N. Y., 582) there was a statement by defendant's counsel in these words: "We will have it understood that an exception follows every objection on this trial," and this was not dissented from. Yet the court held that this simply entitled the defendant, on the settlement of the case, to have exceptions entered to such rulings as he might desire to have reviewed. And the court said: "If it went further and was intended to govern the action of the appellate tribunals and require them to review rulings to which no exception was entered in the case, we cannot give effect to it. The provisions of law which require a party desiring to review rulings upon a trial to take exceptions in proper form are established for the convenience of the courts as well as for the protection of the parties; and the latter cannot by stipulation have their cases heard on appeal without regard to those provisions."

The same doctrine is asserted in *People v. Buddensieck* (103 N. Y., at page 501). The rule is more forcibly applicable in this case where the parties have endeavored to stipulate away the need of objections as well as of exceptions. We do not think that can be done. We are to review rulings alleged to be erroneous; and a ruling upon evidence

can only be made upon an objection. If evidence was not objected to when offered, then it came in by consent. If no objection was made, then the learned referee's attention was not called to the question of its admissibility, and, therefore, no error was made; and we are not bound to examine questions which might have been properly decided if they had been raised in the court below. To stipulate that objections and exceptions may now be "considered as taken" is an attempt to create errors which never existed on the trial; and we shall give no effect to any such stipulation. It is enough for us to review actual decisions upon objections to evidence duly excepted to. Applying this rule, then, the case shows that nothing was objected to except the names of the persons present when he got the paper; no other specific objection was taken. He did not say that he got it from Scott, deceased, or that Scott delivered it to him, or that Scott knew of his getting it. No inference is to be drawn that Scott delivered it, any more than might have been drawn from the mere fact that Greer had it in his possession; and this had been proved without objection.

If he had said that no one but Scott was present, another phase would exist. But the fact that three persons were present, one of whom was Scott, does not show a transaction with Scott. Whether or not Greer took it stealthily and without the knowledge of any one is not shown. The paper could not be found, and it was necessary to prove its contents. And to permit this it was necessary to show that it had once been in Greer's hands and that he had searched for it in vain. He might, as was said in *Simmons v. Havens* (101 N. Y., 427), have received it from some other person; from Crannell or from Frothingham, or he might have taken it without delivery by anyone. If he took it without Scott's consent, then there was no transaction between Scott and Greer. To state the names of the persons in a room at a certain time cannot be called testimony concerning a personal transaction between two of them; suppose there had been fifty persons in the room. We think the testimony was properly admitted.

The appellant insists that the testimony of Crannell to the effect that upon the request of Scott he drew the deed and took his acknowledgment of it, and that the description in the deed embraced the two parcels, was incompetent because in violation of section 835

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of the Code of Civil Procedure, prohibiting an attorney from disclosing any communication made to him by his client in the course of his professional employment. The deed was drawn, executed and acknowledged in the presence of the defendant Greer. Greer was a party to the deed. Such a transaction is not privileged. (*Whiting v. Barney*, 30 N. Y., 330; *Hebbard v. Haughian*, 70 id., 54.) Besides, the only material matter involved was whether at the end of the whole transaction a deed from Scott to Greer existed, and if so, what were its contents. If the deed had not been lost it would speak for itself. Being lost, its existence and contents could be proved by any witness who had read the deed.

Upon defendant's theory it was his property when lost, and what he sought by Crannell's testimony was a description of his lost property. The witness was a reluctant one, and by his method of testifying seemed to succeed in raising the issue of a violation of privilege. But it was a false issue.

The judgment must be affirmed, with costs.

LEARNED, P. J., concurred; MAYHAM, J., not acting.

Judgment affirmed, with costs.

GEORGE R. SHERMAN AND OTHERS, SURVIVORS, RESPONDENTS, v. JOHN D. SLAYBACK AND ANOTHER, APPELLANTS.

Chattel mortgage—sale of the chattels in bulk, and at a place where they were not in view of the purchasers—such a purchase by the mortgagee does not extinguish the equity of the mortgagor—effect of the mortgage retaining possession without a sale.

In an action brought to charge the directors of a corporation, organized under chapter 611 of the Laws of 1875, with liability for its debts, by reason of their failure to file the annual reports required by that act for the years 1886 and 1887, it appeared that the corporation was, on August 24, 1886, indebted to the plaintiff in the action in the sum of \$17,086.84, and on that day mortgaged its furnace, etc., held by it under lease, to secure such indebtedness and surrendered the same to the plaintiffs, who took possession thereof, and thereupon the corporation ceased to transact business.

On August 13, 1886, the corporation, by its treasurer, executed and delivered to the plaintiffs an instrument in writing, in which it acknowledged itself indebted

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to the plaintiffs, and, in consideration of an extension of time of payment of the debt and other considerations, it released and surrendered to the plaintiffs its said furnace, adjacent premises and property, of which the paper recited that the plaintiffs had taken possession at six o'clock on that day, and on August twenty-fourth, to secure the indebtedness to the plaintiffs, a bill of sale or chattel mortgage was executed by the corporation of certain chattels therein mentioned, providing for the payment of such sum on or before the 1st day of January, 1887.

The corporation having defaulted in its payment the chattels were sold on January 18, 1887, at the door of one of the mills. The sale did not take place in sight of all the property, which was offered for sale in bulk, and not in parcels, and was struck off to one of the plaintiffs for \$1,000, no one except the secretary of the company being present. The property covered by the mortgage exceeded in value the amount of the plaintiffs' claim.

On the 18th day of June, 1887, the present action was brought to charge the defendants, as directors, with the balance of the indebtedness of the company. *Held*, that as the object of the sale was to cut off the defendants' right to redemption in equity, that the sale, in order to effect that purpose, must, in all respects, be regular and fair and *bona fide*, and one that would be upheld as a valid sale at common law.

That as this sale was made of personal property which was not within the view of the bidders, and was not sold in separate parcels, that it could not be sustained. *Semble*, that by reason of the invalidity of the sale the mortgagee continued to hold, in his capacity as mortgagee, possession of the chattels, in which the mortgagor still had the equity of redemption, and that the possession and retention by the mortgagee of property of sufficient value to pay the debt without making a valid sale thereof, would operate as a payment and satisfaction of the plaintiffs' claim pending the continuance of such possession thereof by the mortgagee.

Semble, that, as the debt, for which, as directors, the defendants were sought to be made liable, could not have been recovered against the corporation if an action had been brought against it, while this condition of affairs existed, that the directors could not be held liable therefor.

APPEAL by the defendants John D. Slayback and Frank B. Robinson from a judgment of the Supreme Court, entered in the office of the clerk of the county of Essex on the 18th day of June, 1889, and from an order granting an extra allowance to the plaintiffs, which order was also duly entered in the office of the clerk of the county of Essex.

The action was brought for the purpose of enforcing the individual liability of certain directors of the Port Henry Steel and Iron Company (Limited), because of the failure of the board of directors to file an annual report, and because of their having made a false certificate. The action was tried before a referee, upon whose report judgment was entered in favor of the plaintiffs.

Bacon & Merritt, for the appellants.

Waldo & McLaughlin, for the respondents.

MAYHAM, J.:

This is an appeal from a judgment in favor of the plaintiffs, entered upon the report of a referee for \$19,689.44, recovery and costs. The action was brought to charge the defendants as directors of the Port Henry Steel and Iron Company (Limited), with a debt alleged to be due to the plaintiff from that company. Under the provisions of chapter 611 of the Laws of 1875, under which the company was organized, on the grounds, first, that the defendants, as directors, had failed to file the annual reports required by that act for the years 1886 and 1887; and, secondly, for making an alleged false certificate that the capital stock of the company had been actually paid in, in cash, before the making of such certificate. The referee found that the certificate that the capital stock had been paid in full was true, and disposed of that question in favor of the defendants; so that the only real question in controversy on this appeal is, as to whether or not these defendants are liable for not filing their annual report required to be filed under the provisions of chapter 611 of Laws of 1875, within twenty days after the 1st day of January, 1886 and 1887.

On the 23d of April, 1885, the copartnership known as the firm of "Witherbee, Sherman & Co., consisting of Silas H. Witherbee, George R. Sherman, Frank S. Witherbee, George D. Sherman and Walter C. Witherbee, leased to John D. Slayback, Charles M. Raymond, Frank B. Robinson, Andrew Dickey and Thomas F. Witherbee, their blast furnace, known as the "Cedar Point Furnace," at Port Henry, Essex county, N. Y., lease to run from the 15th day of June, 1885, for five years, for the rent and royalty of one dollar per ton of pig iron which the lessees shall make, the lessees covenanting that it shall amount to not less than \$1,200 in any one year. The lease also provides for the time and manner of payment. The lease also provides that the lessees might, at any time before the 1st of June, 1885, form a corporation under the general manufacturing laws of the State of New York, with a

capital of not less than \$100,000, and in that case the lessees had the right to transfer the lease to such corporation.

On the twenty-first day of May the lessees filed in the Secretary of State's office articles of incorporation as provided in said lease, and the pleadings admit that the defendants are the directors and officers of such corporation, and had been such directors and officers and continued to act in that capacity from the time of its organization until June 7, 1887.

The name of the corporation was the "Port Henry Steel and Iron Company (Limited)." Immediately after the incorporation the lessees assigned to it the lease and the corporation took possession, and in June, 1885, commenced operations under this lease.

The referee finds, and the case shows, that no annual report was made by the directors and officers of this corporation within twenty days after the 1st of January, 1886, as required by section 18 of chapter 611 of the Laws of 1875. The referee also found, upon the request of the defendants, that, on the 24th day of August, 1886, this corporation was indebted to the plaintiff in the sum of \$17,086.84, and that on that day it mortgaged its property to secure such indebtedness and surrendered its plant to the plaintiffs, who took possession, and thereupon the company ceased to manufacture and never resumed, and that the company was then bankrupt. The referee also found that the indebtedness has never been paid or satisfied, except one thousand dollars (\$1,000), and that there remains due \$16,496.00, to which finding the defendants duly excepted.

On the 13th of August, 1886, the corporation, by its treasurer, executed and delivered to the plaintiffs an instrument in writing, in which it acknowledged itself indebted to the plaintiffs, and in consideration of an extension of time of payment and other considerations, it released and surrendered to the plaintiffs said furnace, adjacent premises and property, and all its interest in the property, and reciting that the plaintiffs have taken possession thereof at six o'clock on that day.

The instrument also provided for the return of the property to the company on the 1st day of January, 1887, provided the company perform certain stipulations mentioned in the writing on demand of the company. No rent to accrue while the plaintiffs held possession, and if not demanded before that time the right

of the company under the lease and to all of the property is surrendered, and the same was to be regarded as the property of the plaintiffs.

It also provided that the corporation was to have the use of the yard and grounds on which their iron or steel was piled until the 1st of January, 1887.

This instrument was acknowledged on the 24th day of August, 1886, and on that day a bill of sale or chattel mortgage was executed by this corporation, by its treasurer, to secure an indebtedness of the company to the plaintiffs of \$17,086.84, on all the property of the company in the "Cedar Point Furnace," and all scraps or scrap iron, conditioned for the payment of that sum on or before the 1st of January, 1887, and also all other indebtedness of the company to the plaintiff: and in case of non-payment at that time plaintiffs were authorized to take possession and sell the same at public or private sale for the satisfaction of such indebtedness.

On the twelfth of January, the company having failed to pay such indebtedness, the plaintiff gave notice of a sale to take place on the eighteenth of that month.

On that day the plaintiff, by an auctioneer, at the door of one of the mills, and not in sight of all the property, offered the mortgaged property for sale in bulk, and not in parcels, and the same was struck off and sold to one of the plaintiffs for \$1,000, no one except the secretary of the company being present, and no one, as is claimed, authorized to represent the company on such sale.

This action was commenced on the 13th day of June, 1887. As the same is in the nature of a penal action as to these defendants, personally and *ex delicto* in its character, it is incumbent on the plaintiff to prove a state of facts clearly bringing the case within the statutory provisions which give the right of action. (*Carr v. Rischer*, 119 N. Y., 117.)

The first point made by the appellant is that the plaintiffs failed to prove an indebtedness of the corporation at the time of the commencement of the action or at any time before the trial. If this contention be true, in fact, then the plaintiffs could not recover.

The rule is well settled upon authority, and it would seem to be well founded in principle, that unless the corporation were indebted so that an action was maintainable against it at the time of the com-

mencement of the action against the directors, no action would be maintainable against them.

In the *Rector, etc., of the Trinity Church v. Vanderbilt* (98 N. Y., 174): "If there be no obligation giving a present right of action against the company, there is no debt which can be demanded as a penalty against the trustee."

We must, therefore, first determine whether at the time of the commencement of this action, June 13, 1887, there was a debt due the plaintiff from the company on which a present right of action existed.

When the parties plaintiff and the company entered into the contract of August 13, 1886, it is quite apparent that the corporation was indebted to the plaintiffs, but in what amount does not appear. By that contract the corporation obtained an extension until January 1, 1887, and by that extension the plaintiffs postponed any right of action that might then have existed against the corporation, and consequently no claim could, during that period, be enforced against the defendants as trustees.

In *Jones v. Barlow* (62 N. Y., 202) it was held that trustees are only liable to an action for debts actually due, and for which a present right of action exists against the corporation. But it was also held that an extension of the time of payment by the creditor to the corporation did not operate to discharge the trustees if the corporation failed to pay at the end of the extension, as the act of extension is to be regarded as a transaction between them and the creditor.

It follows, therefore, that if, after the expiration of the extension, the debt still exists, and if it has not in some way been discharged, the trustee or director in default in making the report required by law will still be liable for the debt.

The extension in this case, either by the contract of August 13 or the mortgage of August 24, 1886, did not defer payment beyond January 1, 1887, and in the meantime the corporation did not pay the debt unless the acceptance of the property under the contract of August thirteenth, or the possession of the same under the chattel mortgage of August twenty-fourth operated as a payment of the same.

The defendants insist that taking possession of property largely in excess in value of the amount of the debt, and holding it

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after default, vested the title in the plaintiffs and operated as payment of the debt, and was tantamount to a satisfaction of the same after the first of January when the company defaulted in the payment after maturity of the mortgage.

If this position can be successfully maintained, then the plaintiffs at the time of the commencement of the action, June 13, 1887, which was after default in the mortgage, had no claim, and the corporation at that time owed them no debt, and the defendants would, consequently, be exonerated from any forfeiture or liability.

In this State the law seems well settled that, after default in a chattel mortgage, the title vests in the mortgagee, and he may, if not in possession, reduce the property to his possession, and is not required to sell; and in such case, if the property is equal in value to the amount of the debt, taking possession amounts to a satisfaction of the debt.

In *Morgan v. Plumb* (9 Wend., 392), SAVAGE, Ch. J., in delivering the opinion of the court, says: "When the defendants in this case took possession under the mortgage, the property was worth the debt, and according to the decisions referred to in Massachusetts and in this State, the debt was paid."

In *Case v. Boughton* (11 Wend., 109) the court says: "If the mortgagee simply re-enters, but does not sell, and the property is of sufficient value to satisfy the debt, the debt is paid."

The title in the chattel mortgaged, after default, under a chattel mortgage is absolute in the mortgagee. (Thomas on Mortgages, 445, 446.) Unquestionably the mortgagee after default may sell the mortgaged chattel under the power of sale, and must do so or he waives his claim for deficiency; but, in order to fix the amount of the deficiency and foreclose the rights of the mortgagor and prevent him from redeeming in equity, he must make a fair and *bona fide* sale under the power contained in the mortgage, or have recourse to actual foreclosure of the equity by judicial proceedings. (*Porter v. Parmly*, 43 How., 445.) But the plaintiff in this case made a sale under the power of sale in the mortgage, and if that sale was a fair and just and *bona fide* sale for a reasonably fair price, which was fairly applied upon the debt, then the defendants cannot complain and would be bound by it; and hence we are brought to a consideration of the circumstances of that sale. On the 8th and

10th of January, 1887, plaintiffs caused to be posted in three or more public places at Port Henry written or printed notice of sale of all the right and interest of the Port Henry Steel and Iron Company, in and to the buildings, machinery, erections, tools, fixtures and appliances; also hoisting machines or engines, all machinery or apparatus connected therewith, placed by it upon the premises; and also all scraps and scrap-iron owned by it on said premises. The property includes the buildings, machinery and fixtures on the south side of the furnace erected for use in making steel and for other purposes by said company. The notice also recited that it was by virtue of the chattel mortgage, and that the property was to be sold at public auction on the eighteenth of January at 1 o'clock P. M. at the Cedar Point furnace. The case shows that the sale took place at the time fixed in the notice, and was made under an arch-way between the furnaces. The notice was read by the auctioneer and all the property offered for sale together, and not in parcels. There were but two or three persons there, except the members of the plaintiffs' firm.

There was but one bid made, and that was for \$1,000, and the property was sold on that bid to Thomas Witherbee, one of plaintiffs' firm; some of the property sold was not in view at the time of the sale.

The referee finds that the property exceeded in value the amount of plaintiffs' debts or claim at the time of the sale, and the undisputed evidence shows it to be largely in excess of such indebtedness. Had there been no sale, as we have seen, the possession and retention of the property by the mortgagee would, in law, have operated as payment and satisfaction of the plaintiffs' claim. (*Morgan v. Plumb*, 9 Wend., 392, *supra*; *Case v. Boughton*, 11 id., *supra*.) Did this sale to the mortgagee, one of the plaintiffs, for a grossly inadequate consideration, under the circumstances of this case, change the situation of the plaintiffs, as mortgagees in possession of mortgaged property after default sufficient to satisfy their debt? I think not. It is true that a mortgagee of chattels may purchase at the mortgage sale, and that circumstance alone does not render the sale void. (*Casserly v. Witherbee*, 119 N. Y., 522.) But it may be seriously questioned whether the situation of a mortgagee in possession, who sells the mortgaged property under the power of sale and becomes himself the purchaser, does not still occupy the position

of a mortgagee in possession with his mortgage debt paid by reason of the value of the property exceeding the amount of the mortgage debt. In the *Buffalo Steam Engine Works v. The Sun Mutual Insurance Company* (17 N. Y., 403) it was held that a sale of a chattel under a mortgage by a mortgagee in possession to himself, by virtue of the power of sale in the mortgage, did not divest the equity of redemption of the mortgagor, and the court says: "He (the mortgagor) still held the equity of redemption. Of this he was not absolutely divested even after forfeiture of the condition of the second mortgage. The pretended foreclosure and sale could have no effect to divest him of that interest. It was not a judicial sale, but simply an attempt to sell by virtue of the power of sale contained in the mortgage. The mortgagee, therefore, becoming himself the purchaser, acquired no additional title by the sale, but remained mortgagee still. As owner of the property by virtue of the mortgage he could not sell to himself, and as the grantee of a power, although coupled with an interest, he would be equally unable to sell to himself without some statutory aid."

Applying this rule to the case at bar, the plaintiffs would still be mortgagees in possession of the mortgaged property after default, and the property exceeding in value the amount of the plaintiffs' claim against the corporation there would be no debt due the plaintiffs from the corporation upon which forfeiture by the defendants could be predicated.

The referee found that this sale was fairly conducted and was a valid sale, and that the \$1,000 bid should be deducted from the plaintiffs' claim, and ordered judgment against the defendants for the balance. To these findings and conclusions the defendants except. We think the exceptions well taken. We cannot agree with the learned referee that in this action, as against these defendants, upon the testimony as it stands in this case, the sale should be upheld. It is quite apparent that the object of this sale was to cut off the defendants' right to redeem in equity, and to effect that purpose we have seen that the sale must in all respects be regular, fair and *bona fide*, and one that would be upheld as a valid sale at common law.

In *Shimer v. Mosher* (39 Hun, 155), the court says: "It is a rule of the common law, that when personal property is sold at a public sale, either judicial or statutory, the same should be in view

of the bidders and should be sold in such separate parcels as is best calculated to bring the highest price.

In *Stief v. Hart* (1 N. Y., 20), it was said that a sale of personal property without having it within the view of the bidders, for the purpose of ascertaining and estimating its value, was an abuse of the process of the court, and was condemned by the common law without the aid of the statute as to the manner of conducting the sale. (*Linnendoll v. Doe*, 14 Johns., 222, *Sheldon v. Soper*, Id., 352; *Cresson v. Stout*, 17 id., 116.)

These cases are quoted with approbation in *Shimer v. Mosher* (*supra*) and the court adds: "This rule has been uniformly enforced by the courts and has its foundation in the plainest precepts of fairness and public policy." We think it has been disregarded in this case, and as it is a case highly penal in its character we think that the safeguards and guarantees furnished by law, and ordinarily available for the protection of parties and for the due administration of the law, should be applied.

The judgment is reversed, the referee discharged and a new trial ordered, costs to abide the event.

LEARNED, P. J. :

I think that the decision in *Casserly v. Witherbee* (119 N. Y., 522) is practically decisive of this case, and, therefore, concur in the result.

LANDON, J. :

It was held in *Casserly v. Witherbee* (119 N. Y., 522, 526), an action in which the mortgage sale here in question was involved, that the fact that the mortgagees bought the property at the sale under their chattel mortgage does not, of itself, render the sale void. It was alleged in the complaint in that case that the property bought by the mortgagees under their mortgage for \$1,000 was worth \$60,000, and similar allegations were made in that complaint as to the sale of the property in bulk, while invisible to the persons attending the sale, as are here shown by the evidence to be true. The court held that such a sale was invalid. The referee in this action finds that, after the mortgage sale, the plaintiffs sold and disposed of some of the property and applied other portions thereof to their own use, and that the value of the portion applied to their own

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use added to the amounts received by them upon sales of other portions, are in excess of the indebtedness of the company to the plaintiffs, namely, \$17,086.84. The case cited came up on demurrer to the complaint. The sale of property, worth to exceed \$17,086.84 for \$1,000, offends the sense of justice in the same manner, but to a less degree than the sale of \$60,000 worth of property for \$1,000. It is still violent injustice, and we cannot but believe that it was suffered to take place under a misapprehension by the company of the purpose for which the plaintiffs made it. Looking for the causes of this misapprehension, we find that the chattel mortgage was given August 24, 1886, but that on the 13th of August 1886, the Steel and Iron Company delivered to the plaintiffs an agreement under which the latter took possession of the leased property and the plant and appliances of the company thereon, and extended payment of the company's indebtedness to them until January 1, 1887. This agreement was intended to suspend the lease and rent while the company was out of possession, and to permit the plaintiffs to operate the works. The company was to be restored to possession at its election upon the performance of certain specified conditions, but in case it should not demand it on or before January 1, 1887, then "all right of said Steel and Iron Company under said lease and to all said property is surrendered and the same is to be regarded as the property of said Witherbees, Sherman & Co."

Thus, when the chattel mortgage was given, the plaintiffs were in possession of the property under the agreement. The company did not demand re-possession of the property on or before January 1, 1887, and, therefore, when the plaintiffs subsequently sold it under the chattel mortgage they sold what was regarded under the agreement as their own property. If, under the agreement, they had the legal title, they had it for the purpose of realizing the amount due them. Between the agreement and the chattel mortgage they have so managed their security as to realize from it more than the amount due them. Why should they not credit the company with it? The foreclosure of the chattel mortgage could hardly be regarded by the company as a hostile proceeding at the date it was made. If the agreement had not conferred full title, the company naturally would not object to the plaintiffs making it as complete

as possible, in order the better to realize upon the security. The company certainly could not have understood that the plaintiffs thereby intended to deprive the company of nineteen out of every twenty dollars to be realized from the security. The plaintiffs would have disclaimed any such intention.

I think that sale should be regarded as merely perfecting the plaintiffs' legal title in order the better to dispose of the security for the benefit of both debtor and creditor, and hence that the plaintiffs should account to the company for all they have realized upon the security.

Again, though the plaintiffs might be buyers as well as sellers at their mortgage sale, yet the sale to themselves should be above just suspicion as to its propriety and fairness; the result here shows that this sale was unjust whether there was any wrong intended or not; and as in this action no third persons are to be injured by setting it aside, it should be set aside unless treated as vesting the title in the plaintiffs in trust to apply the proceeds of the property to the benefit of the company.

I, therefore, concur in the result reached by Justice MAYHAM.

LEARNED, P. J., concurred.

Judgment reversed, new trial granted, referee discharged, costs to abide event.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, v. THE ULSTER AND DELAWARE RAILROAD COMPANY, RESPONDENT.

Board of Railroad Commissioners — power of, to give a certificate dispensing with the further extension of a railroad — an action by the people, to annul the corporation, does not preclude its so doing — its reasons for so doing not renewable — additional allowance — tax on franchise not a basis therefor.

Chapter 236 of the Laws of 1889, amending chapter 430 of the Laws of 1874, authorizing the Board of Railroad Commissioners to certify that the public interests do not require that a railroad corporation should extend its railroad beyond that portion thereof actually constructed at the time that title to the road has been acquired by it, is not an assumption of judicial power upon the part of the legis-

lature, nor is it unconstitutional as conferring judicial power upon the Board of Railroad Commissioners.

The fact that an action has been brought and is pending on behalf of the people to annul the charter of the railroad corporation, because of its failure to complete its road in accordance with the requirements of its certificate of incorporation, does not affect the right or restrict the power of the Railroad Commissioners to give a certificate under such acts.

The courts have no power to pass upon the reasons given for the issuing of such a certificate by the Railroad Commissioners.

Evidence of the amount of taxes paid by the railroad company, under chapter 861 of the Laws of 1881, upon its corporate franchises, is not competent proof of the value thereof, nor does it afford a basis for determining the amount upon which an extra allowance may be computed.

APPEAL by the People of the State of New York, the plaintiff, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Albany on the 24th day of May, 1890, with notice of an intention to bring up for review, upon such appeal, both questions of law and of fact.

The action was brought to annul the defendant's charter on the ground that it had not completed its railroad within the time required by law.

Upon the trial, which was had at the Albany Circuit on the 15th day of January, 1890, the jury, by direction of the Court, found a verdict for the defendant. An additional allowance of \$1,500 was also granted by the court to the defendant.

E. Countryman, for the appellant.

J. E. Burrill, *George Zabriskie* and *Edwin Young*, for the respondent.

LEARNED, P. J.:

We have nothing to do in this case with the alleged bad faith or breach of contract in the dealings of the Rondout and Oswego Railroad with the town of Harpersfield. That town is not the plaintiff.

The only question is whether the people have a right to annul the charter of the Ulster and Delaware Railroad Company for the failure to construct a certain part of the route originally laid out. We do not consider it necessary to decide the question whether the defendant, taking title under the foreclosure of a mortgage made by the Rondout and Oswego Railroad Company (or New York,

Kingston and Syracuse Railroad Company) and organizing under chapter 430 of the Laws of 1874, became bound to complete the road as originally laid out. We have great doubt whether it came under any such liability. But, as we think there is a conclusive defense to this action, we deem it best to pass the question above mentioned.

Chapter 236 of the Laws of 1889 adds a new section to chapter 430, Laws of 1874, being the reorganization act. This declared that nothing therein contained shall be construed to compel a corporation organized under that act to extend its road beyond the portion thereof constructed at the time the corporation acquired title, provided the Board of Railroad Commissioners should certify that the public interests did not require such extension.

It provided that if such certificate should be made the corporation should not be deemed to have incurred any obligation so to extend its road; and that such certificate should be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and should be final and conclusive in all courts and proceedings whatever. Under this statute the defendant petitioned the Railroad Commissioners. Notice of the presentation of the petition was published and was served on the town of Harpersfield, which had been the active party in instigating the present action. On the 24th of June, 1890, the board made and filed its certificate in compliance with said act. This is set up by defendant in an amended answer.

Now, it is plain that this certificate is a bar to this action unless the plaintiff can show some reason why the statute does not apply or why it should be held unconstitutional or void. The plaintiff insists that the statute is void because it assumes judicial power. We do not think that the language that the reorganization act "be construed to compel a corporation" to do a certain thing is an assumption of judicial power. It is simply a mode of stating the meaning of the legislature in making the amendment. But the further language that the certificate when made should be a bar to proceedings like the present is certainly not open to the objection that it assumes judicial power in construing statutes.

Further, the plaintiff insists that this act is unconstitutional in giving judicial power to the Board of Railroad Commissioners. We do not see that judicial power is given to the board. Administra-

tive duties often require an administrative officer to decide on the proper course of action, and for that purpose to ascertain what are the facts in the matter before him. But he is not, therefore, exercising judicial functions. In the present case the people have the right to annul the charter, if they show good cause. The legislature, has the right, in behalf of the people, to refuse to annul the charter, even if there be good cause. And it has a right to say that the charter shall not be annulled and that the corporation shall be relieved from any obligation which it might have owed to the State to do a certain act. Such being the right of the legislature, we see no reason why it may not authorize a board of its administrative officers to inquire what the public interests demand in that respect, and to decide whether the public interests do or do not require the corporation to do a certain act. The only parties are the people speaking through the legislature, on the one hand, and the corporation on the other. We have no occasion to say, if there were a controversy between the corporation on the one side and some individual on the other, whether the legislature could compel the submission of that controversy to this board. That does not arise here. It is only the State itself which says, if our Board of Railroad Commissioners certify that the public interests do not require the building of a certain piece of road, then it need not be built.

Very possibly the legislature could not declare that a certificate of the Railroad Commissioners should be a bar to an action by one private individual against another. But it is certainly competent for the State to surrender any right of action which it may have. It could declare that no action on its behalf for the annulling of a charter should be further prosecuted. So here the legislature has declared that if the Board of Railroad Commissioners give a certificate, then the State will not further prosecute its action.

The legislature is certainly competent to stop a litigation which is prosecuted on behalf of the State. There is no interference with the judicial power when a plaintiff declines further to prosecute his case. And this statute, by which the legislature says that a certain certificate of State officers shall put an end to State prosecution, does not interfere with any judicial authority.

There is no need of a discussion about the power of the legis-

lature to enact laws which shall take effect upon certain conditions, or upon its power to delegate legislative functions, for there is nothing in this statute but a waiver of a forfeiture, or, in other words, a refusal to annul a charter. The legislature authorizes certain boards to convey the property of the State, as, for instance, land under water. Cannot it authorize another board to give a certificate which shall practically waive a forfeiture which no one but the State could enforce? The State has frequently, by statute, extended the time within which a corporation was to build a road. This was a waiver of the forfeiture for not building. And a statute of that kind would be a bar to an action for forfeiture, if such an action should be commenced, or if such an action were pending. The State is not bound to enforce a forfeiture, and if it waives a forfeiture, no private individual or body can object.

It seems to us that the error on the part of the plaintiff's counsel is in the application of very sound and important doctrines. If this were a controversy between two private individuals, it might well be doubted whether the legislature could enact that a certificate of Railroad Commissioners should be a bar. But the real meaning and plain effect of the statute are simply that the State will not continue a litigation when its own board of officers have said that the public interests do not require it. The Attorney-General stands in the strange position of insisting upon prosecuting an action for the State which the State has said shall be barred. Of course, this is explained by the not unusual circumstances that the Attorney-General allows some other party to use his name of office. But that other party, the town of Harpersfield, has no right to enforce a forfeiture which the State has waived, or to seek to annul a charter on grounds which the State has declared shall not be a cause for such annulling.

The plaintiff further insists that the reasons given by the Board of Railroad Commissioners for its certificate are not satisfactory. It was not bound to give any reasons, though this was a very proper course. But it is not in our power to review the action of the board, even if we thought its reasons improper or insufficient, which we do not. It is enough that the statute makes the certificate, not the reasons, conclusive and a bar.

The judgment of the learned justice is correct and should be affirmed, with costs.

Another question is presented by the appeal from the order granting an extra allowance. There is no doubt that the case is one in which an extra allowance was proper. But the plaintiff urges that there was no proof of the value of the corporate franchise, and that only upon that value could the allowance be based. (*Conaughty v. Saratoga County Bank*, 92 N. Y., 401.)

The defendant, to show the value of this franchise, showed the taxes which it had paid for several years under the statute, chapter 361, Laws of 1881, etc. The defendant claims that these statutes impose a tax on corporate franchises, and not on corporate property. (*People v. Home Ins. Co.*, 92 N. Y., 328.) That hence the valuation on which the tax is assessed must be a measure for the franchise taxed. Now the statute may impose a tax on an amount which shall greatly exceed the real value of the franchise. The mode in which a corporation is assessed under these statutes merely determines the amount at which, for the purpose of taxation, its franchise shall be estimated.

We think that this assessment does not bind the State as to the actual value of the franchise when such value had to be ascertained on the motion. Not only does it not bind the State, but we do not see that it is evidence. The question before the learned justice was, what was the value involved, that is, what was the value of the franchise. And upon that point these several taxations of the defendant do not seem to us to be evidence.

We think, therefore, that the order should be reversed only on the ground that the value of the franchise was not shown.

The judgment must be affirmed, with costs; order of extra allowance reversed on the ground that the value of the franchise was not shown.

LANDON and MAYHAM, JJ., concurred.

Judgment affirmed, with costs; order for extra allowance reversed on ground that there is no proof of value of franchise.

M. FRANCIS WAGER, APPELLANT, v. THOMAS B. LINK
AND OTHERS, RESPONDENTS.

Deed in which the grantee assumes payment of a mortgage on the premises conveyed—when the grantee (although his grantor was obligated to pay the mortgage) cannot be sued by the mortgagee.

A mortgagor conveyed the mortgaged premises by a quit-claim deed, and his grantee executed to the holder of the bond and mortgage a bond conditioned to pay the amount thereof; such bond was, by its terms, collateral to the bond and mortgage and required the obligee to first exhaust his remedy against the mortgaged premises.

The grantee who gave this bond subsequently conveyed the premises, subject to the payment of the bond and mortgage, by a full covenant deed, by the terms of which his grantee assumed and agreed to pay said bond and mortgage as part of the purchase-money.

Held, that the obligation assumed by the grantee in the last-mentioned deed did not enure to the benefit of the mortgagee, and could not be enforced by him.

APPEAL by the plaintiff M. Francis Wager from an order granted at a Special Term, held in the county of Albany on September 30, 1890, confirming the referee's report in the above-entitled action, and denying the plaintiff's motion to charge the defendant Thomas B. Link with the deficiency arising upon a mortgage foreclosure sale in said action, which order was duly entered in the office of the clerk of the county of Columbia on October 21, 1890; and also from that part of a judgment granted on September 30, 1890, and entered in the office of the clerk of the county of Columbia on the 21st day of October, 1890, granting the defendant Thomas B. Link a judgment of \$286.69 against the plaintiff, and refusing to grant the plaintiff a judgment for deficiency against the defendant Thomas B. Link.

E. R. Harder, for the appellant.

Orin Gambell, for the respondent.

LEARNED, P. J.:

This is an appeal by the plaintiff from that part of a judgment of foreclosure which denied him a personal judgment for deficiency against Link and which gave Link costs.

Jennie Sully, in 1869, executed the mortgage in question to

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plaintiff. In June, 1873, she conveyed the premises to Kellogg by a quit-claim deed. In February, 1874, Kellogg executed to plaintiff a bond conditioned to pay the amount of the Sully bond and mortgage, stating therein that his bond was collateral to the bond and mortgage, and requiring the obligee to exhaust his remedy against the premises before suing the bond of Kellogg.

In April, 1875, Kellogg conveyed the premises to Link by full covenant deed, subject to the payment of the bond and mortgage, by the terms of which deed Link assumed and agreed to pay said bond and mortgage as part of the purchase-money. The sole question is whether the obligation thus incurred by Link enures to the benefit of the mortgagee so that he can recover thereon. Link had no knowledge of the bond executed by Kellogg to plaintiff. Mrs. Sully's deed to Kellogg was on record, and as Link purchased from Kellogg he would be chargeable with knowledge of the contents of that deed, and, conversely, would be entitled to assume from that deed that Kellogg was under no obligation to pay the plaintiff's mortgage. Link, therefore, cannot be said to have knowingly contracted with Kellogg for the indirect benefit of the mortgagee, being ignorant that Kellogg was under any obligation in respect to the mortgage.

When a mortgagor conveys the premises, and in the deed the purchaser agrees to pay the mortgage, then, equitably, the purchaser becomes the primary debtor and the mortgagor becomes the surety. In such case the purchaser is liable to the mortgagee.

But in the present case Kellogg, the purchaser, did not by the purchase become the principal debtor. Indeed, he did not enter into any agreement with Mrs. Sully, either at the time of the purchase or afterwards. Kellogg's bond to the plaintiff was a distinct matter, and gave Mrs. Sully no rights against him. In fact, that bond is expressly collateral to the Sully bond and mortgage and cannot be enforced until the obligee has exhausted his remedy against the premises. Thus Kellogg stands in a very different position from that of a purchaser who, by his deed, has agreed with the mortgagor and vendor to pay the mortgage.

To go one step further, when a purchaser who has thus become the primary debtor himself conveys to one who, by the deed, assumes

the debt, then such second purchaser in his turn becomes in equity the primary debtor and liable to the mortgagee. Such liability, however, depends on the fact that his grantor was at the time of the sale the person primarily liable in equity to pay the mortgage.

In the present case, as has been shown, Kellogg never became the primary debtor in equity, and never assumed any liability to Mrs. Sully, the mortgagor. The mortgagee, in order to hold Link liable to him, must deduce such liability through the mortgagor. If Mrs. Sully could sue Link, then the plaintiff could sue him. But as Kellogg's bond to the plaintiff was a personal matter, unconnected with the sale by Mrs. Sully to Kellogg, and one which gave her no right of action, it follows that Link's agreement with Kellogg was merely personal between them and gave no right of action to any one but Kellogg himself. Kellogg took the agreement from Link for his own protection; and, as Kellogg was only a surety, and as he did not obtain this security from the principal debtor, Mrs. Sully, the creditor has no claim to it. Of course, there is no question made here that Link is liable to Kellogg on the clause in the deed. The question is, whether the plaintiff has any right to the benefit of that clause. We think he has not for the reasons above stated. The doctrine which we have set forth is laid down in the cases of *Vrooman v. Turner* (69 N. Y., 280); *Turk v. Ridge* (41 id., 201); *Carter v. Holahan* (92 id., 498). We think that the error of the plaintiff is in assuming that the liability of Kellogg on his bond to the plaintiff was of such a character that any security which Kellogg took would be for the plaintiff's benefit. But Kellogg, being himself only a surety, could take for his individual protection any security except, perhaps, from the principal debtor; and the security thus taken would not of necessity be for the benefit of the creditors.

The judgment appealed from must be affirmed, with costs against appellant.

LANDON, J., concurred; MAYHAM, J., not acting.

Judgment affirmed, with costs against appellant.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. JASPER W. GILBERT, RESPONDENT, *v.* EDWARD WEMPLE, AS COMPTROLLER OF THE STATE OF NEW YORK, APPELLANT.

Supreme Court justice — the pension on his reaching the age of seventy years is not conditional on his having served ten years of the abridged term.

It is not necessary, in order to entitle a justice of the Supreme Court to receive the annual sum of \$1,200, provided for by section 1 of chapter 541 of the Laws of 1872, after he has retired from office by reason of having reached the age of seventy years, that he should have served ten years during the term of office which is abridged by reason of his reaching the age of seventy years during such term, but said justice is entitled to the pension, where he has served as a justice for ten years, during either one or more terms, prior to such abridgment of his term of office.

APPEAL by Edward Wemple, as comptroller, etc., from an order made at the Columbia County Special Term, and entered in the office of the clerk of that county on the 2d day of September, 1890, by which order a writ of peremptory *mandamus* was directed to issue commanding the said Edward Wemple, as comptroller, to pay to Jasper W. Gilbert the sum of \$6,000, as and for arrears of compensation as a justice of the Supreme Court.

Charles F. Tabor, for the appellant.

Stephen P. Nash, for the respondent.

Order affirmed on opinion of court below, with fifty dollars costs and disbursements.

OPINION OF COURT BELOW.

EDWARDS, J. On January 1, 1883, the relator had served as a justice of the Supreme Court for the period of seventeen years, continuously, when his second official term of fourteen years, nine of which had expired, was abridged by reason of his having attained the age of seventy years. His compensation for the remaining five years of his term has been paid to him, except the annual sum of \$1,200 provided by section 1, chapter 541, Laws of 1872, which the respondent declines to pay on the ground that the provision of

the Constitution which continues the compensation of a justice whose term of office has been abridged by limitation of age is inapplicable to one who has served fewer than ten years of the abridged term. It is now settled that the \$1,200, of which payment is sought to be enforced, is part of the compensation provided by section 13, article 6 of the Constitution (*Bockes v. Wemple*, 115 N. Y., 302), and the only question for our consideration is whether the relator is within the provisions of that section. The portions of the section which are here material read as follows: "The official terms of the said justices * * * who shall be elected after the adoption of this article shall be fourteen years from and including the first day of January next after their election. But no person shall hold the office of justice * * * longer than until and including the last day of December next after he shall be seventy years of age. The compensation of every * * * justice of the Supreme Court whose term of office shall be abridged pursuant to this provision, and who shall have served as such * * * justice ten years or more, shall be continued during the remainder of the term for which he was elected." Must the "ten years or more" be a part of the abridged term to entitle the retiring justice to a continuance of his compensation. This is the sole question to be answered, and its proper determination must be sought for in the language of the section cited. In the interpretation of statutes it is a primary rule that the intent is to be ascertained, but it is also fundamental that, so far as possible, the intent must be derived from the language employed. When this is free from ambiguity or contradiction, it is self-interpreting, or, more accurately speaking, needs no interpretation. When the words used have a definite and obvious meaning, we are not at liberty to resort to those artificial rules of construction which wisdom and ingenuity have been compelled to devise by reason of the infirmity and obscurity of language. The words must be accepted in their plain import, and we are not permitted to add to or take from the language employed, in order to extend or restrict the operation of the statute to what we might conceive to have been the legislative intent. With this familiar principle in view, let us see whether the language of this section is not so plain, so free from doubt, as to need no extrinsic aids of construction. Concededly, the apparent meaning

of the first and second clauses is, that the official term of a justice of the Supreme Court shall be fourteen years, and in case he shall become seventy years of age during such term, he shall not hold the office longer than until the following last day of December, that is, his term is thereby abridged. Unless the framers of this section have chosen inapt words to express their idea, their intent is as clearly discoverable in the language of the following clause, which explicitly declares that the compensation of a justice of the Supreme Court, whose term has been abridged, shall be continued during the remainder of the term for which he was elected, in case he has served as such justice ten years or more. But it is claimed that this clause should be construed as if it read "ten years or more of such term," that is, ten years or more of the term abridged. Why should it be so construed? The import of the words used is plain, and why should we add to them to change the signification? The language is not "who shall have served ten years or more of such abridged term," but is "who shall have served as such justice ten years or more." It seems to me quite clear that it is only by injecting into the clause the additional words, which the respondent claims should be regarded as there, that his contention as to its meaning can be sustained. Without these additional words it is obvious that the language means one thing; with them it is equally obvious that it means another thing. The interpolation of such words into a statute as change the meaning and restrict its operation is a legislative and not a judicial function. Perhaps it would have been wiser if this clause had been so framed as to extend its beneficent provisions to those only who had served ten years of the abridged term. However this may be, it is our province not to reform the law, but simply to declare *ita lex scripta est*.

The motion for a writ of peremptory *mandamus* should be granted.

Present — LANDON and MAYHAM, JJ.; LEARNED, P. J., not voting.

Order affirmed on opinion of court below, with fifty dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. THOMAS WILLIAMS, WILLIAM FERGUSON
AND THOMAS ROGERS, APPELLANTS.

Evidence—trial for petit larceny—proof of similar transactions having taken place elsewhere.

On a trial upon the charge of petit larceny alleged to have been committed by the accused in stealing ten dollars, the property of one Dayton, it appeared that the defendants went into Dayton's store, asked to purchase some candy and tendered a twenty-dollar bill in payment therefor, for which they received back nineteen dollars and some change. Thereupon one of the defendants, stating that he had found sufficient money to purchase the candy, requested Dayton to hand back the twenty-dollar bill, which was done, and some money was returned, which at the time Dayton supposed to be the money he had given in exchange for the twenty-dollar bill, but which was, in fact, ten dollars less.

Held, that evidence that the defendants, on the same evening and at another place, were guilty of a similar transaction, was competent.

APPEAL by the defendants from a judgment of conviction of the crime of petit larceny, rendered against them by the Court of Special Sessions of the city of Albany on the 25th day of March, 1890. The crime was alleged to have been committed in stealing ten dollars, the property of one George A. Dayton.

The evidence of the complainant showed that on the morning of the day of the alleged larceny he counted the bank bills kept by him in a package in the inner compartment of the safe in his store, and that there were in that package \$224 in bills, the denomination of which he could not state; that he locked the inner compartment where the money was with a key and put it under a shelf; that the outer door of the safe was locked by a combination lock; that in his business as confectioner he was assisted by his wife and a Miss Reed; that he did not at any time during the day, from the time of counting the money in the morning until the time of the alleged larceny, interfere with that package, except once to put with it a two-dollar bill and take out a one-dollar bill; that about seven o'clock in the evening the defendants Ferguson and Williams came into the store and asked to purchase some candy, and, on being served, handed a twenty-dollar bill in payment, and on being asked if they had anything smaller, answered in the negative, whereupon complainant

went to the safe, opened the inner compartment, and took out nineteen dollars and handed it with the change to Ferguson and received the twenty-dollar bill; defendants then walked towards the front of the store and complainant towards the safe, when Ferguson, addressing complainant, asked him to return the twenty-dollar bill as he had found change, and did not like to be carrying about small change, and pursuant to that request complainant returned to the defendant the twenty-dollar bill and received back what he, at the time, supposed was the money he had parted with, but which he returned to the safe without counting. Soon after that he was asked by a detective if he had lost any money; on examining the package in the safe he found that it contained but \$215.

On his cross-examination the complainant said he paid his help that day and would not swear positively how many times he put bills in or took them out of that package that day; don't remember how many times he went in the safe and made change from these bills positively

Miss Reed and Mrs. Dayton, who assisted in the store, both testified that they did not interfere with or take any bills from this package in the inner compartment of the safe that day. This is the substance of the evidence tending to establish the *corpus delicti*.

The prosecution then called as a witness a druggist, who was permitted by the court, under defendants' objection, to testify that, on the same evening of the occurrence charged in the complaint, the defendants Ferguson and Rogers bought a cake of soap and tendered a twenty-dollar bill in payment, and on being asked if they had anything smaller answered in the negative, and the bill was taken and nineteen dollars and eighty cents returned to them in change. Ferguson requested the return of the twenty-dollar bill, and offered the change for the soap, but was refused, and before leaving the defendant Rogers bought a stick of licorice and tendered in payment a five-dollar bill, and the clerk refused to change it and told him to pay at some other time.

The prosecution proved, under like objection, that on the same evening the defendants, Ferguson and Williams, called at a tea store and purchased a half pound of tea for twenty-five cents, and Ferguson handed in payment a twenty-dollar bill and received in change nineteen dollars and seventy-five cents, and after receiving

it said he could pay for the tea in change, and requested the return of the twenty-dollar bill, the clerk looked over the money which defendant proposed to return, and then got the twenty-dollar bill and gave it to Ferguson. Defendant Rogers came in the store while the other two defendants were there, and purchased a pound of sugar at seven cents and paid for it, but did not speak to the other defendants.

Under a similar objection by the defendants, the people also proved that on the same evening Ferguson and Williams went into a restaurant and bought twenty-five cents worth of cigars and handed a twenty-dollar bill in payment and received nineteen dollars and seventy-five cents in change, after which one of them found he had a quarter, and requested the return of the twenty-dollar bill, and it was given to them, they then shoved back the change which was put in the drawer, and on making the account up later in the evening the account was found to be short ten dollars.

James C. Matthews, for the appellants.

Andrew Hamilton, for the respondent.

MAYHAM, J. ;

We think the evidence sufficient to establish a *corpus delicti*, and that the finding of the jury that the crime charged was committed is fully sustained by the evidence. The appellants insist that the learned recorder erred in admitting, under objection, the evidence of the acts of these defendants at other stores on the same evening of a somewhat similar character to that at the store of Dayton.

This evidence was doubtless offered by the people for the purpose of showing the motive of the purchasers in tendering the twenty-dollar bill and receiving other and necessarily smaller bills in exchange, so that they might abstract one or more of the smaller bills and return the balance unobserved, in exchange for the twenty-dollar bill and thus steal the bill or bills so abstracted ; such a device, artfully practiced by a shrewd operator, might easily deceive the unsuspecting tradesman in the hurry of business, and there is some evidence in this case that it has become one of the methods of larceny under the name of "flim flam." The defendants' counsel relies upon the *People v. Corbin* (56 N. Y., 363), and *Coleman v.*

People (55 id., 81), as authorities in support of his objections to this evidence.

In the case first above cited the court held that it was not proper on the trial of an indictment for forgery to prove that the defendant had admitted that he had committed other forgeries; and in the latter case that it was not competent, on the trial of an indictment for receiving stolen goods, to show, for the purpose of proving the *scienter*, that the prisoner had received other stolen property. Neither of these cases come entirely within the principle under which the evidence in the case at bar was offered and received. They were not offered to be shown proximate in time nor precisely identical in character with the crimes charged in the indictment. We think the case now before this court is more nearly in principle like the case of *Weyman v. The People* (4 Hun, 517; affirmed, 62 N. Y., 623, and the cases there cited.)

In that case it was held to be competent for the people to show that on the day of the alleged commission of the crime charged, and on the next day the prisoner in the same way and by the same means procured similar articles of other persons, and the court says such evidence "is competent to show that the party accused was engaged in other similar frauds about the same time, provided that the transactions are so connected as to time, and so similar in their other relations that the same motive may reasonably be imputed to them all." (See, also, *Hall v. Naylor*, 18 N. Y., 588; *Hennequin v. Naylor*, 24 id., 139.)

This kind of evidence is frequently resorted to in the trials of indictments for passing counterfeit money, and the object of such testimony is to prove that the act is not an isolated or accidental occurrence, but that it was done by deliberate design. We think this evidence, under the circumstances of this case, was proper, and that the exception to its admission was not well taken.

We discover no error in the admission of evidence or in the charge of the recorder to the jury, and the jury having found the defendants guilty upon evidence sufficient to uphold the verdict, we think the judgment of conviction and sentence pronounced were proper. It is quite true, as is urged by the counsel for the defendants, that the right of trial by a jury is guaranteed to the defendants and

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they are in no way responsible for the failure of two previous juries to agree, and that fact alone should not aggravate their punishment.

But the judgment and sentence pronounced were within the limits of the jurisdiction of the court which pronounced them, and we do not think it is the province of this court on this appeal to criticise or interfere with them.

The judgment of conviction is affirmed.

LEARNED, P. J., and LANDON, J., concurred.

Judgment and conviction affirmed.

RAYMOND CHRISTMAN, APPELLANT, v. JOHN M. PHILLIPS, AS OVERSEER OF THE POOR OF THE TOWN OF AMSTERDAM, RESPONDENT.

Overseer of the poor in Montgomery county — the sole judge as to who are paupers — audit by town auditors, at what time proper.

In an action brought against the overseer of the poor of the town of Amsterdam to recover the value of services, rendered by his direction, in the care of a transient pauper, it appeared that the overseer of the poor employed the plaintiff's assignors to nurse one Murphy, which they did, and thereafter gave them orders on the town board in payment for such services; that these orders had been presented to the town board of auditors, and had been disallowed by that board on the ground that they were not proper charges against the town, whereupon the court directed a verdict for the defendant.

Held, that the overseers of the towns in the county of Montgomery, under section 8 of chapter 42 of the Laws of 1863, were the sole and exclusive judges as to who were paupers of their towns, and should be relieved by them, and that the exercise of that power could not be reviewed collaterally either in the Supreme Court or by the town auditors.

Semble, that the town auditors had no authority to examine and adjudicate upon the accounts of the overseers of the poor at any other meeting than that held on the last Tuesday preceding the annual town meeting of their town under section 1 of chapter 172 of the Laws of 1863.

By chapter 3 of said act it is made the duty of the town board of auditors to make a statement of such accounts and append thereto a certificate, to be signed by a majority of the board, showing the state of the accounts of said officers to the date of the certificate, which statement and certificate are to be filed in the town clerk's office.

Semble, that before parol evidence could be given as to what took place at such meeting, the absence of the statement and certificate should be accounted for in such manner as to let in secondary evidence of its contents.

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APPEAL by the plaintiff Raymond Christman from a judgment of the Supreme Court, entered in the office of the clerk of the county of Montgomery on the 19th day of February, 1890, after a trial before the court and a jury at the Montgomery Circuit, at which a verdict was rendered by direction of the court in favor of the defendant; and also from an order denying a motion made for a new trial on the exceptions in the case, and to set aside the verdict on the ground that it was contrary to evidence, entered in said clerk's office February 22, 1890.

C. S. Nisbet, for the appellant.

Peter J. Lewis, for the respondent.

MAYHAM, J.:

This action was prosecuted against the overseer of the poor of the town of Amsterdam on an alleged contract made with that officer for the care and attention rendered by plaintiff's assignors to a transient pauper, supported at the expense of the overseer of that town.

The case shows that one Edward Murphy was found along the railroad track in Amsterdam seriously injured, of which injury he subsequently died; that he was without means of support, and was taken care of by the overseer of the poor of that town; that the overseer of the poor employed plaintiff's assignors to nurse and care for Murphy, which they did, one nursing during the day and the other during the night.

These nurses both swear that the overseer of the poor employed them and agreed to pay them or see them paid. One of these parties was employed twenty-five days (25) and the other twenty-one (21) nights. They commenced service about the 24th of September, 1887.

On the eighth day of October the acting overseer of the poor of Amsterdam gave to these persons orders in the following forms:

No. ———

“October 8, 1887.

“Town board pay A. Van Auken, a nurse, for nursing Edward Murphy, a town charge, the amount of fifty dollars for 25 days services, and charge the same to the town of Amsterdam.

“JOHN W. THATCHER,

“*Overseer of Poor.*”

No. _____

"October 8, 1887.

"Mr. Daniel Martin, a nurse for Edward Murphy, let him have forty-two dollars for 21 days services, and charge the same to the town of Amsterdam.

"JOHN W. THATCHER,

"Overseer of the Poor."

To each of these orders was attached an affidavit of the plaintiff, as assignee, that he was the owner of the claim, and that no part of the same has been paid.

On the trial the defendant proved, under objection by the plaintiff, by several officers constituting the board of town auditors, that the overseer of the poor had presented these bills to the town auditors, and they were disallowed by that board on the sole ground that they were not proper charges against the town. No record of the action of these town auditors on these claims, or minutes in writing of their action, was made by said board.

Upon these facts the court directed a verdict for the defendant, and the plaintiff appealed.

Section 1926 of the Code of Civil Procedure enumerates certain officers who may maintain actions in their official capacity upon contracts lawfully made with them, etc., and names overseers of the poor among such officers.

Section 1927 provides that "an action or special proceeding may be maintained, against any of the officers specified in the last section, upon any cause of action which accrues against them, or has accrued against their predecessors, or upon a contract made by their predecessors in their official capacity and within the scope of their authority." Under this provision a party may recover upon a contract lawfully made with an overseer of the poor or his predecessor in office. By section 3 of chapter 42 of the Laws of 1863, "the powers and duties heretofore conferred upon and exercised by the supervisors of the respective towns in said county of Montgomery, so far as relates to the adjudication in relation to and the relief and support of the poor, are hereby conferred upon the overseers of the poor of the respective towns in said county."

Under this statute the overseer of the poor of the town of Amsterdam, one of the towns in that county, is the sole and exclusive judge

(subject, perhaps, to review for abuse of that power) as to who are paupers of said town, and consequently who may be relieved by him. In furnishing such relief he must necessarily be invested with the power to make contracts for the care of such as he may have adjudged paupers, and the exercise of that power could not be reviewed collaterally either in this court or by the town auditors. The trial judge held that it was conclusive as to this court, and its exercise could not be reviewed on the trial. But he held that the plaintiff having submitted his claim to the determination of the board of town auditors, their determination was final and, until reviewed and reversed in a direct proceeding, it was conclusive upon the parties.

This would, doubtless, be sound, if the board of town auditors had power to pass upon this claim in the first instance, and had, in the exercise of that jurisdiction by a valid act, with the parties interested legally before them, made a determination. But that is not this case. The plaintiff and defendant never submitted to the board of auditors the question whether the defendant, as overseer of the poor, was liable to the plaintiff for the value of their services, which had been rendered by the plaintiff's assignors for the defendant as overseer of the poor under a valid contract.

Clearly the board of auditors had no power to pass upon that question. If the defendant had paid the money under this contract, and had presented it as a disbursement of his office to the board of town auditors, they might then have had jurisdiction to pass upon it, and then, if they had rejected it, they would have been required to make a certificate as required by section 3 of chapter 305 of the Laws of 1840, and which might be reviewed on *certiorari*, or its allowance compelled by *mandamus* if improperly rejected.

But this plaintiff or his assignors had no claim that they could enforce directly against the town had the board made a record refusing to allow the claim, even if presented by the plaintiff. We do not see how that would have barred the plaintiff's claim against the overseer of the poor as such. The legal effect of this transaction was, that the overseer, by drawing his draft for this amount, acknowledged the existence of his liability to the payee, even if the payee presented it in person to the drawer, who refused to accept or pay the same; it would not exonerate the drawer, but rather tend to charge him for its payment. It matters not what excuse for

non-payment is made by the drawer. It may be want of funds, or it may be a denial of the validity of the claim; the drawee's refusal, and the ground upon which the refusal is placed, in no way relieves the maker from his liability to the payee. The fact remains that the debt exists and has not been paid. We do not think that the plaintiff is concluded by the action of the town board for the reasons above stated.

The plaintiff insists that it was error to receive the evidence of the town auditors as to their recollection of what occurred at the time it is alleged the account or claim in question was presented to them or their action upon the same, on the ground that if there was any legal action taken before them, and any determination by them, it should have been reduced to writing in the form of a certificate and filed in the town clerk's office, and that would have been the best evidence; and that that certificate or record should be produced, or its loss or destruction proved before parol testimony in the action could be received.

Section 1 of chapter 172 of the Laws of 1863 provides as follows: "The town auditors of the several towns of this State, shall examine the accounts of the overseers of the poor * * * of such town for all moneys received and disbursed by them, and shall meet for the purpose of examining the same, annually, in each town of this State on the Tuesday preceding the annual town meeting to be held in each town."

Section 2 of the same chapter provides: "All town officers who receive or disburse any moneys belonging to their respective towns, shall on the last Tuesday preceding the annual town meeting of their town, account with the board of town officers of such town for all moneys received and disbursed by them by virtue of their offices."

Section 3 of the same act makes it the duty of the town board of auditors to "make a statement of such accounts and append thereto a certificate to be signed by a majority of the board showing the state of the accounts of the said * * * and other officers at the date of the certificate; which statement and certificate shall be filed with the town clerk of the town."

No statute has been referred to, nor are we able to find any that confers on the town auditors authority to examine or adjudicate the accounts of overseers of the poor at any other time or at any other

meeting. The meeting in November was the one which preceded the meeting of the board of supervisors, and not the one preceding the annual town meeting, and it does not appear that the town auditors had any authority at that meeting to audit or examine the overseer's account. But if we are to assume that it was the regular meeting to examine such accounts, then we think that the certificate required by statute to be made and filed would be clearly the best evidence, and its absence should be accounted for in such a manner as to let in secondary evidence of its contents. That was not done or offered to be done by the defendants.

The rule that records when required to be kept are the best evidence, and must be produced or their absence properly accounted for, before resort can be had to secondary evidence, is too elementary to require citation of authorities. We think the admission of that kind of evidence in this case was error, and that its admission affected prejudicially the rights of the plaintiff.

The judgment is reversed and a new trial ordered, costs to abide the event.

LEARNED, P. J., and LANDON, J., concurred on the first ground, that if the action of the auditors is not binding, it is immaterial whether it was properly proved.

Judgment and order reversed, new trial granted, costs to abide event.

IN THE MATTER OF THE APPLICATION OF THE SARATOGA ELECTRIC RAILWAY COMPANY TO ACQUIRE A CERTAIN CROSSING OF THE RAILROAD OF THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY.

Appeal from orders in proceedings for railroad crossings — allegation of the petition as to the consent of property owners — effort to agree.

An order of the Supreme Court, appointing commissioners in proceedings to ascertain and determine the points of the crossings and intersections of the tracks of one railroad by another, affects a substantial right within the meaning of section 1356 of the Code of Civil Procedure. Such proceedings are not regulated by chapter 140 of the Laws of 1850.

The petition of a railroad company, incorporated under chapter 252 of the Laws of 1884, asking for the appointment of commissioners to ascertain the points of crossing another road, must allege that it has acquired the consent of one-half in value of the adjoining property owners and of the local authorities, to the construction of its road, in order to confer jurisdiction on the court to act thereon. Negotiations relative to the crossing of one road by another, had with the general manager, vice-president and attorney of the road sought to be crossed, when such officers assume to negotiate for their company, and no notice is given to the person with whom they confer that they have not authority to act, constitute an effort to agree with such company within the requirement of the statute relating thereto.

APPEAL by the President, Directors and Company of the Delaware and Hudson Canal Company from an order made at a Special Term of the Supreme Court held in Saratoga county on April 15, 1890, which appointed commissioners to ascertain and determine the matters referred to in the application in the above-entitled matter.

Edgar T. Brackett, for the petitioner.

Edwin Young, for the appellant.

MAYHAM, J.:

This is an appeal from the order of a Special Term of this court appointing three commissioners on behalf of the Saratoga Electric Railroad Company to ascertain and determine the points of the crossings and intersections of the track of the electric railroad of said company, over and across the track of the Rensselaer and Saratoga Railroad, leased and occupied by the Delaware and Hudson Canal Company, also fixing the time and place of the first meeting of such commissioners.

The order was made upon the petition of the Saratoga Electric Railway Company, duly verified, the verified answer of the President, Managers and Company of the Delaware and Hudson Canal Company, and the proofs taken on the hearing of the motion before the Special Term. On the hearing of the motion the appellant filed various objections, which were overruled by the court.

The points urged on this appeal, upon which a reversal of the order is asked, are:

First. That the petition does not state facts sufficient to authorize the court to make the order.

Second. That the act of the legislature under which the petitioner claims to have been organized, and under which it claims the right to have commissioners appointed, is unconstitutional and void.

The respondent insists that the order of the Special Term in appointing commissioners is not appealable, and in support of that contention urges that the proceedings on this application are regulated by chapter 140 of the Laws of 1850, and the amendments to the same, which, it is claimed, form a complete system of procedure in cases of this character, which are in no way affected by the provisions of the Code relating to appeals from orders. No motion has been made to dismiss this appeal; and as an appeal has been taken in due form, and regularly brought on in this court for hearing upon the merits, it should not be dismissed unless it is entirely clear that this class of cases is excepted from the provisions of the Code relating to appeals to the General Term from orders of the Special Term.

Section 1356 of the Code of Civil Procedure provides that "an appeal may be taken to the General Term of the Supreme Court * * * from an order affecting a substantial right made in a special proceeding at a Special Term or a Trial Term of the same court."

This provision seems applicable to all orders in special proceedings affecting a substantial right, and if the appointment of commissioners, clothed with authority to hear and determine disputed questions between parties, affects a substantial right, then the order appointing them is, within this provision, appealable, unless restricted by the provisions of the general railroad act (chap. 140, Laws of 1850), which provides that the determination of the General Term of the Supreme Court upon appraisal of damages to land owners, shall be final and conclusive under that provision. Under that provision it has been held that no appeal lies from the judgment of the Supreme Court to the Court of Appeals. (*Matter of Delaware and Hudson Canal Company*, 69 N. Y., 209.) The same was held in *Matter of Prospect Park and Coney Island Railroad Company* (85 N. Y., 489). But it will be observed that these cases arose upon judgments of the General Term of the Supreme Court, on appeals from orders confirming reports of commissioners on appraisal of damages, which was made final by section 18 of chapter 140, Laws

of 1850, and in neither of the cases cited was the right of a party to appeal to the General Term, from an order of the Special Term appointing commissioners, discussed or decided, and except, in so far as the right to appeal is expressly, by the act of 1850, prohibited or abridged, it should be governed by the provisions of the Code of Civil Procedure, relating to appeals from orders, especially where no motion has been made to dismiss the appeal.

This conclusion brings us to the consideration of the question raised upon the merits in this motion, as we think the appointment of commissioners affected a substantial right within the meaning of section 1356 of the Code.

In the *Matter of Lockport and Buffalo Railroad Company* (77 N. Y., 558), the General Term and Court of Appeals entertained an appeal from the report of commissioners on a contest between railroads as to a crossing.

The allegation of the incorporation of the petitioner was sufficient, especially as the answer was not so framed as to put in issue the existence of the corporation. (Chap. 508, Laws of 1875.)

But the appellant insists that the petition of the relator was defective, in that it did not affirmatively appear from the same, that the relator had complied with the provisions of chapter 252 of the Laws of 1884, under which it claimed to have been incorporated. Section 1 of that act provides that "such corporation shall also have all the powers and privileges granted, and be subject to all the liabilities imposed by this act, or by the act entitled 'An act to authorize the formation of railroad corporations and to regulate the same,' passed April 2, 1850, and the several acts amendatory thereof, except as the said acts are hereby modified."

Under this provision of the act of 1884 it is insisted by the appellant that as the act of 1850 does not require the railroad corporation to acquire the consent of one-half in value of the adjoining property owners before it could construct, maintain or operate its road, and that that additional requirement is imposed by section 3 of chapter 252 of the Laws of 1884, that it is incumbent upon the relators, organizing under the last-mentioned act, to allege and prove that the requisite consents have been obtained as prescribed in that act, and that the procuring of such consent is a condition precedent to the construction, maintenance, operation or use of such railroad,

and that the appointment of commissioners is an act affecting the construction, maintenance and operation of the relator's railroad, and that the relator is not authorized to take that initial step towards construction without first obtaining that consent, proof of which must appear in the petition to confer jurisdiction upon the court to make any order condemning the land or affecting the rights of the appellant.

The provision relied upon reads as follows: "Any company organized as aforesaid, or any existing street surface railroad company or corporation heretofore organized for the purpose of building and operating a street railroad, may construct, maintain and operate, use and extend a railroad or branches on the surface of the soil through, upon and along any of the streets, avenues, roads or highways of such cities, towns and villages, and also through, along and upon any private property which said company may acquire for the purpose, and may also construct such switches, sidings, turnouts and turntables and suitable stands as may be necessary for the convenient working of such road, provided that the consent in writing of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be, after the passage of this act, first obtained."

Was the allegation that the petitioner had obtained the requisite consent under the provisions a necessary and material allegation to authorize the appointment of commissioners in this case?

Clearly the petitioner would not be authorized to construct and operate its road until such consent was obtained. The company may construct and operate its road through and along such streets and avenues or highways of such city, town or village and also through, along and upon private property which said company may acquire for the purpose * * * "provided that the consent in writing of the owners of one-half in value of the property bounded on, * * * be after the passage of this act first obtained."

If the appointment of these commissioners for the purpose of condemning and getting the possession of the right to cross the appellant's road-bed, is a part of the petitioner's act of constructing or operating its road, then this consent was as much a necessary prerequisite as the organization or incorporation of its company,

and an allegation of that fact in the petition would be as material as an allegation of an incorporation or the location of the route or a failure to agree upon the terms of crossing, each of which are conceded to be necessary averments in the petition. (*Matter of Lockport v. Buffalo Railroad Company, supra.*)

It may be conceded, as it is doubtless true, that the appointment of these commissioners is no part of the physical construction or operation of the road, but it is a preliminary prerequisite to the physical construction without which no physical construction or operation of the road can be legally effected.

It is the initial step under the exercise by the legislature of the sovereign power of eminent domain by which the rights of one may be taken and used by another for a public purpose ; and the steps prescribed by the legislature which are necessary to invest the applicant with authority to invoke that power should clearly appear as the foundation of the proceedings.

If before the petitioner can exercise the franchise conferred by its charter the legislature has imposed conditions and restrictions, it must comply with such conditions as a preliminary to its enjoyment of the grant.

It is true that the general railroad act as amended, provides a statutory method of compelling the connection and crossing of railroad tracks by different companies ; and corporations formed under chapter 252 of the Laws of 1884, are given by a section of that act the following powers :

“Such corporations shall also have all the powers and privileges granted, and be subject to all the liabilities imposed by this act, or by the act entitled ‘An act to authorize the formation of railroad corporations, and to regulate the same,’ passed April 2, 1850, and the several acts amendatory thereof, except as the said acts are herein modified.” (Sec. 1, chap. 252, of 1884.)

One of the essential modifications applicable to the construction and operation of a railroad constructed under the act of 1884 is the condition above referred to, which is not found in the general railroad act, and before the petitioners can avail themselves of the provisions of the general railroad act that condition must be complied with. That provision did not exist in the statute under which the decisions in the *Matter of Lockport and Buffalo Railroad*

Company (supra) was made, and hence what the court in that case held to be sufficient in the petition does not control in this case.

In that case it was not essential that the petitioners obtained the consent of the one-half in value of the adjoining property owners. It was, therefore, quite enough for the petition to show the incorporation, the location of the road, and that it crossed the other road, and that terms of crossing could not be agreed upon between the parties.

In that case the corporation, the location of the route and the failure to agree, authorized the condemnation of property and the construction of the road.

In this case another and additional prerequisite exists, just as essential to the enjoyment of the right, which is not alleged.

In that case it was held that the omission to allege in the petition that the parties had failed to agree would be fatal to the petitioner's case, and the court says: "The petitioner had no right to resort to the court, until a failure to agree as to the matter specified. Such failure was a condition precedent to any standing in court; and there could be no failure or inability to agree, within the meaning of the statute, until some efforts to agree had in good faith been made." (*Matter of Lockport and Buffalo Railroad Company, supra*, 563.)

If an allegation in the petition of failure to agree in that case "was a condition precedent to any standing in court" for an equally strong reason, it would seem that the allegation of the consent required by the statute should be contained in the petition in this case, for in this case the petitioner can avail itself of the statutory privileges, *provided* it shall, after the passage of the act of 1884, procure the consent in the manner prescribed by that act.

This condition does not appear from the petition or proof to have been complied with, and, without a compliance with it, it would seem that the petitioner acquired no standing in court which would authorize the court to appoint the commissioners against the appellant's objection. The *Matter of the People's Railroad Company* (112 N. Y., 578) was an application to the court for leave to construct the railroad without the requisite consent, and for the appointment of commissioners to determine that question, and does not seem to apply to a case like the one at bar.

It is also insisted in this case by the appellant that the petitioner made no effort to agree with the appellant; in fact, that the negotia-

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tions with the general manager, vice-president and attorney was not an effort to agree with the company. We cannot agree with the appellant in this contention.

The public are compelled to deal with corporations through their ostensibly authorized officers and agents; and while there are many acts which can only be done by the board of directors or executive committee, still, in a matter of this kind, when the officers and agents assume to negotiate for the company and give no notice to the person with whom they confer that they are wanting in authority to act; the company having allowed them to act for it, have invested them with apparent authority, upon which the public have a right to rely.

The conclusion we have reached seems to render it unnecessary for us to consider the remaining and, perhaps, the graver question raised by the appellant of the constitutionality of the act of 1884, so far as it purports to import into its provisions, the provisions of the general railroad act relating to the acquiring of privileges under the right of eminent domain by the condemnation of property or the right to its use.

Without determining the constitutional question raised, we are of the opinion that the order should be reversed.

LEARNED, P. J., and LANDON, J., concurred.

Order reversed, with ten dollars costs and printing disbursements, and motion denied, with ten dollars costs.

WILLIS G. POPE, RESPONDENT, v. LOTTA MCGILL, APPELLANT, IMPLEADED WITH CHARLES MCGILL.

Physician — cannot testify on whom he relied for payment of his services.

In an action by a physician to recover for medical services to a wife, against the husband and wife, the wife alone answered, setting up her coverture, alleging that the services were rendered for her husband. On the trial the plaintiff was asked: "When you rendered the services, to recover for which this action is brought, on whom did you rely for your pay?" To which the defendant objected. The objection was overruled and the plaintiff answered: "On the defendant Lottie McGill."

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Held, that the question was inadmissible; that the real question in the case was as to who was liable for this bill, the wife or the husband, which must depend upon the facts constituting the contract under which the services were rendered.

That it did not lie with the plaintiff to determine these questions, or fix the liability by any intention on his part, as to the person upon whom he relied for the payment for his services.

APPEAL by the defendant Lotta McGill from a judgment of the Supreme Court, entered in the office of the clerk of the county of Essex on the 26th day of May, 1890, upon the report of a referee, who found, among other things, that the plaintiff was entitled to judgment against the defendant Lotta McGill for services rendered by the plaintiff as a physician.

Hewitt & Morey, for Lotta McGill, appellant.

A. W. Boynton, for the respondent.

MAYHAM, J.:

This is an appeal from a judgment entered upon the report of a referee. The action was prosecuted against the defendants jointly to recover for medical services rendered by the plaintiff as a physician. The defendant Charles McGill failed to answer. The defendant Lotta McGill, who was his wife, answered setting up her coverture and alleging that the services were rendered for her husband in furnishing medical attendance for his family and denying any liability for the same on her part.

The evidence shows that the defendants were husband and wife, and that the services were rendered the family while they occupied that relation, and while Charles McGill, the husband, supported the family. The plaintiff testified that he treated Lotta and furnished her medicines from June, 1883, until June, 1888, and that during the same time he treated the defendant's children. That the services were worth \$205.25, and that he had been paid by the defendant, Lotta McGill, sixty dollars on that amount, and that he rendered the services to her at her request. On the trial the plaintiff was asked this question: "When you rendered the services, to recover for which this action is brought on whom did you rely for your pay?" This question was objected to by the defendant and the objection was overruled by the referee, and the plaintiff answered "On the defendant Lotta McGill." Plaintiff also testified that the defendant

Lotta promised to pay this balance, and also to sign a note with her husband for the same, but did not do so.

The defendant proved by the defendant, Charles McGill, that he employed the plaintiff to attend his wife and family as a physician; that the account for such services was presented or sent to him for payment, made out against him personally and in the plaintiff's hand-writing, and that the payments on the same were with his money; that he supported his family, wife and child.

The defendant Lotta McGill also testified that she did not employ the plaintiff, and that she never paid him but five dollars, and that was her husband's money; that plaintiff doctored her, but that she never employed him or promised to pay him for his services, and never agreed to sign a note with her husband for the amount of the bill; that her husband had always supported her and that she had no separate estate.

Bills of plaintiff's account proved to have been rendered by plaintiff, charging the account against Charles McGill, one dated June 14, 1888, stating the balance at \$146.25, accompanying which was a joint and several note dated the same day for the amount, and payable to W. G. Pope and not signed, are in evidence. The defendant insists that the admission of the answer of the plaintiff to the question, "On whom did you rely for your pay?" was error, for which this judgment should be reversed.

The real question in controversy in this action was, who was liable for this bill; was it the husband or was the transaction such as to charge this debt upon the wife? The answer to these questions must depend upon the facts constituting the contract under which the services were rendered; and it does not lie with the plaintiff to determine these questions or fix the liability by any expressed intention of his as to whom he relied upon for payment. That would be allowing a party to place himself in the position of the referee and testify to a conclusion which it was the province of the referee to determine from the whole evidence. That is never allowable. Witnesses must state facts, and courts and jurors must draw conclusions from the facts proved. (*Nicolay v. Unger*, 80 N. Y., 54.)

It is quite immaterial on whom the plaintiff relied for his pay, unless that reliance grew out of or was founded upon a valid agreement, either expressed or implied; and when the party was permitted

to state that he relied on Lotta, it was another way of saying that his agreement was with her, and that he had a legal right to look to her for his pay, and the referee must have so regarded it, or he would have excluded the evidence as wholly immaterial. But there is another ground of objection which was raised by the defendant; that the question called for a conclusion of the witness. We think the admission of this evidence was error, which might have affected, and probably did affect the decision and determination of the referee upon the question of fact in the case.

In *Kellar v. Richardson* (5 Hun, 352) this court held that the question "To whom did you look for performance of the contract?" was improper; that the answer showed merely the thought, and not the act of the party, and was not competent evidence.

In *Betjemann v. Brooks* (39 Hun, 649), the question was: "In delivering the goods which were delivered during the administration of Mrs. Clapp, did you give the credit to Mrs. Clapp personally or to Mrs. Brooks. * * * Not on paper, but in your mind?" This question was objected to and allowed under the objection. *Held*, error.

In *Merritt v. Briggs* (57 N. Y., 652) the question was: "State on whose credit the cattle were bought?" *Held*, that the question was improper.

This error being fatal to this recovery, we do not feel called upon to examine the other questions raised as to the liability of Lotta McGill, as a married woman, upon the facts proved. The judgment must be reversed.

LEARNED, P. J., and LANDON, J., concurred in result.

Judgment reversed, referee discharged, a new trial granted, costs to abide event.

Cases
DETERMINED IN THE
FOURTH DEPARTMENT
AT
GENERAL TERM,
November, 1890.

DANIEL B. WOOD, RESPONDENT, v. THE CITY OF WATERTOWN, APPELLANT, IMPEADED WITH OTHERS.

Master and servant — sub-contractor, of one contracting with a city to do the entire work — the city is not liable for his negligence — proof of damage resulting from loss of time.

In an action to recover for injuries alleged to have been sustained through the negligence of the city of Watertown in the work of repairing a bridge over a branch of the Black river, within the limits of that city, it appeared that the bridge was out of repair, and that by reason of repairs being made thereon it was rendered impassable for teams, although it was used during the daytime by foot passengers; that, a few days before the accident, an alderman of the city, discovering that one of the shoes of the bridge was broken, directed the Bagley & Sewell Company to have new shoes put on. The shoes for the bridge were cast by that company, which employed Henderson and Hill, who were competent and skilled mechanics and fully qualified to do the work, to remove the old shoes and replace them with the new ones. While Henderson and Hill were engaged in this work the accident occurred, and the evidence tended to show that it was caused by their negligence.

Upon the trial the court in its charge, in substance, instructed the jury that the city of Watertown was chargeable with any negligence of which the Bagley & Sewell Company, or its employes, Henderson and Hill, were guilty, and refused to charge that if the Bagley & Sewell Company was employed to do the job of taking off the old and putting on the new shoes with its own men and its own means, and employed Henderson and Hill to help execute the work under its control, that the Bagley & Sewell Company was the superior

and responsible for the conduct of the men, although the Bagley & Sewell Company was doing the work for the defendant, and that there could be no recovery against the city of Watertown for any accident happening by reason of the taking off of the shoes by the men in the employment of the Bagley & Sewell Company.

Held, that as the act which the Bagley & Sewell Company was employed to perform was not in any way wrongful, and the plaintiff's injury was not a necessary consequence of the direction to have such act performed, that the city of Watertown could not be held liable for the negligence of Henderson & Hill on the sole ground that they were acting in the employment of the Bagley & Sewell Company which was employed by the defendant.

That the relation of master and servant did not exist between the city of Watertown and Henderson and Hill in this case.

Where loss of time is claimed as an item of damage for personal injury occasioned by negligence, if the party fails to prove the value of the time lost, or facts upon which an estimate of such value can be based, only nominal damages can be given to him.

APPEAL by the defendant, the City of Watertown, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Jefferson on the 15th day of November, 1888, in favor of the plaintiff and against the defendant, the City of Watertown, and from an order of the court denying a motion for a new trial, made on the minutes of the court, dated September 19, 1888.

The case came on to be tried at a Circuit Court held at the city of Watertown, Jefferson county, on the 10th day of September, 1888, before the court and a jury, at which the jury found a verdict for the plaintiff and against the defendant, the City of Watertown, for \$1,000 damages

Henry Purcell, for the appellant.

S. C. Huntington & Son, for the respondent.

MARTIN, J. :

This action was founded on the alleged negligence of the appellant. On October 3, 1887, a bridge, which had been erected over a branch of the Black river at a point within the corporate limits of the city of Watertown, fell into the river below. The plaintiff was crossing it at the time and was injured by its fall. The plaintiff's claim of negligence was two-fold: 1. That the defendant was negligent in not warning the plaintiff, by notice or otherwise, of the dangerous condition of the bridge. 2. That its agents and employees

carelessly and negligently performed the work of repairing the bridge which they had in charge, and that by reason of such negligence the plaintiff was injured.

The evidence disclosed that this bridge was out of repair, and that the city had employed the firm of Cleveland Bros. to repair its abutments; that, by reason of such repairs, the bridge was rendered impassable for teams while they were being made. The evidence, however, tended to show that it was used during the daytime by foot passengers; that the building of the abutments did not render it particularly unsafe for that purpose; and that the accident to the plaintiff was not in consequence of the repairing of the abutments.

A few days before the accident one of the defendant's aldermen, John W. Spratt, who was also a member of the street committee of the board of aldermen, was at the bridge with the foreman of the Bagley & Sewall Company of Watertown, N. Y., when it was discovered that one of the shoes of the bridge was broken, and it was thought best to have new and heavier shoes put on each of the corners of the bridge at the northerly end. Spratt told the foreman of the Bagley & Sewall Company to have such shoes cast and put on. The Bagley & Sewall Company did an extensive business in furnace and machine work, molding and casting, in iron mainly, and in doing all kinds of iron job work. In pursuance of such direction the Bagley & Sewall Company cast shoes for this bridge, and then undertook to remove the old ones and replace them with the new. It employed for this purpose Henderson and Hill, who were competent and skilled mechanics and fully qualified to do the work. While the men thus employed were engaged in removing one of the old shoes the accident occurred. The evidence tended to show that it was caused by the negligence of the persons thus employed by the Bagley & Sewall Company.

On the trial the court charged: "If the party who was engaged in repairing that truss was guilty of any omission of duty upon his part necessary to maintain the bridge in its place and to guard against accidents to those who might be upon it rightfully at the time, then, gentlemen of the jury, that omission would be an act of carelessness on the part of the defendant, represented by that party, for which it would be chargeable in this case. If, on the contrary, your own good judgments commend to you the conclusion that this

skilled mechanic, in performing the work in the manner that he did, exercised that care and prudence which an ordinarily careful man, doing the same work, would have done, although this accident happened by reason of the breaking of the bolt, there was no carelessness on the part of the defendant or its representatives, and the defendant is entitled to your verdict."

At the conclusion of the charge the appellant's counsel requested the court to further charge: "That if the jury find the accident in question resulted from the taking off of the shoe at the north-east corner, and that the defendant was guilty of no negligence in employing the Bagley & Sewall Company in taking it off and putting a new one in its place the negligence of the Bagley & Sewall Company, if any, cannot be imputed to the defendant."

To this request the court replied: "The negligence of the Bagley & Sewall Company as an independent firm can hardly be attributable to the defendant. The party employed in taking off the shoe, being in the employ of the defendant, if he was guilty of any act of negligence, the defendant is chargeable with that, irrespective of the Bagley & Sewall Company."

DEFENDANT'S COUNSEL — I understand that your honor declines to charge the proposition as requested.

THE COURT — I don't think I will say any more than I have said upon that proposition.

Defendant's counsel duly excepted to the refusal to charge as requested.

Defendant's counsel also asked the court to charge "that it does not appear that the Bagley & Sewall Company was the servant of the defendant in taking off the old and attempting to put on the new shoe, and asked the court to charge the jury that, upon the undisputed evidence, the relation of master and servant did not exist."

THE COURT — "No, I cannot charge that. If the jury find the evidence of Spratt to be true, that he engaged the Bagley & Sewall Company to put on the new shoe, and they confided the work to their subordinate, the party who was engaged in it, and the Bagley & Sewall Company, as well as the subordinate, would occupy the position of servant to the defendant."

DEFENDANT'S COUNSEL — "To your honor's qualification I desire to except, and to the charge, as made, I also desire to except."

Defendant's counsel also requested the court to charge the jury : "That, upon the undisputed evidence, the persons actually engaged in taking off the shoe in question, to wit, Henderson and Hill, at the time of the accident, were the servants of the Bagley & Sewall Company, and not of the defendant," which the court declined to charge, and defendant's counsel duly excepted, and also excepted to the charge as made."

Defendant's counsel also requested the court to charge the jury : "That, if they find that the Bagley & Sewall Company was employed to do the job of taking off the old and putting on the new shoe, with its own men and its own means, and employed others, to wit, Henderson and Hill, to help to do or to execute the work for and under its control, the Bagley & Sewall Company is the superior, and responsible for the conduct of the men, notwithstanding the Bagley & Sewall Company was doing the work for the defendant, and that there can be no recovery for any accident occurring because of taking off the shoe by the men in the employ of the Bagley & Sewall Company."

The court refused to charge the proposition as stated, to which refusal the defendant duly excepted.

The court by its charge instructed the jury that the city of Watertown was chargeable with any negligence of which the Bagley & Sewall Company, or its employees, Henderson and Hill, were guilty, and refused to charge that if the Bagley & Sewall Company was employed to do the job of taking off the old and putting on the new shoes, with its own men and its own means, and employed Henderson and Hill to help execute the work under its control, that the Bagley & Sewall Company was the superior and responsible for the conduct of the men, although the Bagley & Sewall Company was doing the work for the defendant, and that there could be no recovery for any accident by reason of taking off the shoe by the men in the employ of the Bagley & Sewall Company. It is claimed by the appellant that this was error.

In examining the validity of these exceptions, without deciding the question, we will assume that the alderman who employed the Bagley & Sewall Company to do this work had power to act for the defendant in thus employing it. Assuming that such power existed, did the employment proved render the defendant liable for the

negligence of the persons furnished by the Bagley & Sewall Company to do the work? It cannot be pretended that the act which this company was employed to perform was in any way wrongful, nor that the plaintiff's injury was the necessary consequence of the direction to have such act performed. The most that can be claimed in this case is that Henderson and Hill, who were doing the work on the bridge for the Bagley & Sewall Company, were negligent, and plaintiff's injury resulted from such negligence.

The appellant's claim, that the above exceptions to the charge and refusals to charge were well taken, must be sustained, unless the relation of master and servant existed between the defendant and the persons who were guilty of the negligence which caused the accident, if the accident was the result of negligence.

The defendant cannot be held liable for the negligence of Henderson and Hill on the sole ground that they were there acting in pursuance of an employment of the Bagley & Sewall Company by the defendant. "It is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was at the time acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them." (*King v. N. Y. C. and H. R. R. Co.*, 66 N. Y., 181, 184.)

Did the relation of master and servant exist between the defendant and Henderson and Hill? In examining this question it will be remembered that the only evidence of any action on the part of the defendant was, that one of its aldermen, who was a member of its street committee, directed the Bagley & Sewall Company to have new and heavier shoes cast and placed under the bridge. There were no directions as to the manner in which the work was to be done, as to the persons who should be employed to do it, as to the means to be used in removing the old shoes and replacing them with the new ones, nor as to the manner in which the bridge should be supported while this was done. Henderson & Hill were not selected by the defendant to do this work, nor were they in any way under its control. The work was to be done and the materials furnished by the Bagley & Sewall Company: The services were to be rendered and the materials furnished in the course of an

independent occupation, which represented the will of the defendant only as to the result of the work, and not as to the means by which it was to be accomplished. The important question presented here is whether, under these circumstances, it could be properly held that the relation of master and servant existed between the defendant and the persons employed by the Bagley & Sewall Company to do this work, or whether the Bagley & Sewall Company was an independent contractor.

"As a general rule, where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restriction as to its exercise and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of the master, but he is an independent contractor, and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another. If the owner of a building employs a mechanic to make repairs upon the same without any specific arrangement as to the terms and conditions, such employment is in the nature of an independent contract which imposes upon the employee the responsibility incurred by acts of negligence caused by himself or those who are aiding him in the performance of the work." (*Hexamer v. Webb*, 101 N. Y., 377, 383; see, also, *Blake v. Ferris*, 5 id., 48; *Pack v. Mayor*, 8 id., 222; *Kelly v. Mayor*, 11 id., 432; *McCafferty v. S. D. and P. M. R. R. Co.*, 61 id., 178; *Ham v. Mayor*, 70 id., 462; *Town of Pierrepont v. Loveless*, 72 id., 211; *Devlin v. Smith*, 89 id., 470; *Herrington v. Village of Lansingburgh*, 110 id., 145.)

We think the authorities cited decisive of the question under consideration, and that it must be held that the relation of master and servant did not exist between the defendant and the Bagley & Sewall Company, or between the defendant and the persons assigned by the Bagley & Sewall Company to repair this bridge, but that the Bagley & Sewall Company was an independent contractor to

make the repairs directed. It, therefore, follows that the defendant's exceptions to the charge, and to the refusal of the court to charge as requested, were well taken.

But it is said that the defendant was negligent in not preventing the use of this bridge or giving travelers notice of its dangerous condition. The learned counsel for the respondent, in his brief, concedes that "when plaintiff and son commenced crossing, and until they had got about two-thirds of the way over, and until the last fatal blow was given upon the nut, the bridge was, in fact, safe." If that was the case, it is difficult to discover how or in what manner the defendant was negligent. It had no notice, either actual or constructive, that the bridge had or was about to become unsafe. It had a right to assume that the work would be done by its contractor in a careful and proper manner. The learned counsel for the respondent, in his brief, again says: "To all appearances the bridge was unsafe (for teams) or unfit for teams, but safe for footmen to cross." If this was so, it cannot be readily perceived how the defendant was negligent in not preventing the use of the bridge by persons desiring to pass over it on foot.

If, however, we were to assume that it was a question of fact for the jury whether the defendant was negligent in not preventing the use of the bridge, or in not giving notice to travelers that it was unsafe, that would not justify us in disregarding the error of the court in charging that the defendant was liable for the negligence of Henderson and Hill, as the jury may well have based its verdict solely upon the theory of such liability.

The court also charged: "He (the plaintiff) is entitled, by way of remuneration, to recover the value of the time which he has lost by reason of this accident, if he can recover at all. What that is worth is left entirely to speculation. There is no evidence that he was engaged in any particular pursuit, or that he was enabled to earn any particular wages. Indeed, what his business was, or what his capacity was, for earning at the time of the accident, seems to have been left entirely out of the case. But he was forty-six years of age; his own evidence shows he was enjoying good health; capable of laboring, and whatever, in your good judgment, his time is worth, founded upon the evidence in the case, which he lost by

reason of the immediate results of the injury which he sustained, he is entitled to recover as damages in this case." To this portion of the charge the defendant's counsel excepted as follows:

DEFENDANT'S COUNSEL — "We also except to so much of your Honor's charge as submits to the jury the question of the value of the plaintiff's time as an element of damages, for the reason that there is no evidence to show what the value of his time was."

THE COURT — "I think I will leave the question as I have suggested it, upon the evidence of the age of the party; that he was a mason by trade, and that up to the time of the injury he was enjoying good health, and, for aught that appears, was of good habits. Upon the evidence the jury have some basis upon which they can ascertain the value of his services at the time."

DEFENDANT'S COUNSEL — "We also except to the supplemental charge."

Where loss of time is claimed as an item of damages for personal injuries occasioned by negligence, if the plaintiff fails to prove the value of the time lost, or facts on which an estimate of such value can be found, only nominal damages for that item can be given. (*Leeds v. Metropolitan Gas-Light Co.*, 90 N. Y., 26.) In the case cited it was proved that the plaintiff was engaged in business at the time of the injury, but had not been able to attend to it since. It was not shown what his business was or the value of his time, or any facts as to his occupation, from which the value could be estimated. The court charged that plaintiff, if entitled to a verdict, was entitled to recover compensation for the time lost. Held, error, as the jury was left to guess or speculate upon the value of the lost time without any basis in that respect for the judgment to rest upon. We think the case cited is decisive of this question, and that it was error to charge that the plaintiff was entitled to recover the value of the time which he had lost by reason of this accident. As was well said by the judge in his charge, what that time was worth was left entirely to speculation. There was no evidence that he was engaged in any particular pursuit or that he was enabled to earn any particular wages. Indeed, what his business was, or what his capacity was, for earning at the time of the accident, seems to have been entirely left out of the case. The effect of the instruction was to leave it to the jury to speculate as to the value of

the time which was lost by reason of this accident. We think the charge was clearly within the principle of the decision of the case above cited, and that it was erroneous. The doctrine of the *Leeds Case*, so far as applicable to the case at bar, is in no way affected by the doctrine of the *People ex rel. Deverell v. M. M. P. Union* (118 N. Y., 101), as in the latter case there was evidence upon which to base an estimate of the damages. As was said by the learned judge who delivered the opinion in that case: "The question in this respect differed from that in the *Leeds Case*."

An examination of the appeal book upon which the case in 118 New York was heard in the Court of Appeals shows that the relator's evidence was to the effect that while he was a member of the respondent union his income was from twenty-five to thirty dollars per week, and that after he was expelled it did not exceed five dollars a week. Therefore, in that case, there was evidence upon which a claim for damages could be based with some degree of certainty. In the case at bar there was no such evidence. The value of the plaintiff's time was left to the mere guess or speculation of the jury.

For the errors pointed out we think the judgment and order appealed from should be reversed.

Judgment and order reversed and a new trial ordered, with costs to abide the event.

HARDIN, P. J., and MERWIN, J., concurred.

Judgment and order reversed on the exceptions and a new trial ordered, with costs to abide the event.

WILLIAM M. PECK, RESPONDENT, v. ALVA M. BALDWIN,
APPELLANT.

Supplementary proceedings—the order for the examination of the debtor must be made returnable before one of the officers mentioned in section 2484 of the Code of Civil Procedure.

In supplementary proceedings, instituted before a justice of the Supreme Court upon a judgment recovered in that court, where the execution has been issued out of the Supreme Court, the order for the examination of the judgment-debtor must be made returnable before a justice of the Supreme Court residing in the judicial district embracing the county to which the execution has been issued, or before the county judge, or a special county judge, or special surrogate of that county, or of an adjoining county.

The provisions of section 2484 of the Code of Civil Procedure, in this respect, are applicable to a proceeding instituted before a justice of the Supreme Court, where the execution has been issued out of that court, and are not confined in their operation to proceedings instituted before such a justice where an execution has been issued out of another court. (HARDIN, P. J., dissenting.)

APPEAL by the defendant Alva M. Baldwin from an order made at a Special Term of the Supreme Court, held at the village of Watkins, in the county of Schuyler, on the 17th day of June, 1890, and entered in the Tompkins county clerk's office on the 7th day of July, 1890, which order denied a motion to set aside the order in supplementary proceedings, and the order appointing a receiver, theretofore granted in the action.

The judgment against the defendant upon which these proceedings were based was in the Supreme Court, and was entered in the office of the clerk of Tompkins county of which county the defendant was a resident. Execution was issued upon such judgment to the sheriff of that county and no other. Upon the return of the execution unsatisfied, the respondent applied to Hon. GEORGE N. KENNEDY, a justice of the Supreme Court, residing in the fifth judicial district, for an order in supplementary proceedings to examine the defendant as such judgment-debtor. The order was granted, but contained no provision making it returnable before a justice of the Supreme Court residing in the sixth judicial district, or the county judge or special county judge or special surrogate of Tompkins county, or of any adjoining county. The county of Tompkins is embraced within the sixth judicial district.

A referee was appointed by such order to examine the appellant. Upon the hearing before the referee the appellant objected to the proceedings on the ground that they did not require the subsequent proceedings to be had before a justice of the Supreme Court in the district in which the appellant resided. Subsequently an application was made before Judge KENNEDY for the appointment of a receiver, upon which application the appellant appeared and objected to the granting of such order upon the ground that the order for an examination of the defendant was irregular, in that it was granted by a justice of the Supreme Court of the fifth judicial district, while the defendant resided in the sixth, and the order required the subsequent proceedings to be had before a justice of the fifth judicial district, when it should have required them to have been had before a justice of the sixth judicial district, where the defendant resided. These objections were overruled, and Mr. Justice KENNEDY made an order appointing a receiver of the defendant's property.

From that order an appeal was taken to the General Term, where the appeal was dismissed on the ground that an appeal could not be taken to the General Term from such an order, that the appellant's remedy was by motion at Special Term to vacate the same. Subsequently the appellant made a motion at the Schnyler Special Term to vacate the orders referred to, which motion was denied, and from the order denying that motion this appeal was taken.

M. N. Tompkins, for the appellant.

Ceylon H. Lewis, for the respondent.

MARTIN, J. :

Section 2434 of the Code of Civil Procedure, so far as it is applicable to the question involved on this appeal, in effect provides that either of the special proceedings mentioned in section 2432 may be instituted before a judge of the court out of which the execution issued, which includes a justice of the Supreme Court, where the execution was issued out of that court. (*Baldwin v. Perry*, 25 Hun, 72.) It then provides that where the execution is issued out of a court other than the Supreme Court, and the judges thereof are absent or disqualified, such special proceedings may be instituted before a justice of the Supreme Court.

Then follows this provision: "In that case if he does not reside within the judicial district embracing the county to which the execution was issued, the order made * * * by him must be returnable to a justice of the Supreme Court residing in that district, or the county judge or the special county judge or special surrogate of that or an adjoining county, as directed in the order."

The question presented is, whether the provisions contained in the last sentence of that section are applicable to a proceeding instituted before a justice of the Supreme Court where the execution has been issued out of that court, or whether it is confined in its operation to proceedings instituted before such a justice where an execution has been issued out of another court. An exact and literal reading of the section might, perhaps, seem to indicate that this provision was limited in its application to the latter case, but was such the intent of the legislature?

It is one of the rules of construction applicable to statutes that the intent of the legislature is to be sought for, and when discovered is to prevail over the literal meaning of the words of any part of a law. This intent is to be found not only by considering the words of any part, but by ascertaining the general purposes of the whole. The exact and literal wording of an act may sometimes be rejected if, upon a survey of the whole act and the purpose to be accomplished, or the wrong to be remedied, it is plain that such exact and literal rendering of the words would not carry out the legislative intent. (*People ex rel. Jackson v. Potter*, 47 N. Y., 375; *Bell v. Mayor, etc.*, 105 id., 144; *Delafield v. Brady*, 108 id., 529; *People ex rel. Killeen v. Angle*, 109 id., 568.)

In seeking the intent of the legislature in passing this statute we are led to inquire what object or purpose was to be accomplished or what wrong was to be remedied by its enactment. A history of the legislation upon this subject discloses that anterior to the amendment of section 292 of the Code of Procedure, which was passed in 1867, there was no express provision requiring an order in supplementary proceedings, made by a justice of the Supreme Court, to direct the subsequent proceedings to be had before a justice of the district where the judgment-debtor resided or had a place of business. At that time, however, as now, the examination of the debtor was required to be had in the county where he resided. That was so

before the Code of Procedure (*Bank of Monroe v. Keeler*, 9 Paige, 249), and also under the Code of Procedure, except during the years 1849 and 1850. But in 1867 the Code was amended by requiring the proceedings subsequent to the order for the examination of a judgment-debtor to be had in the judicial district where he resided.

The manifest purpose of this amendment was to prevent the judgment-creditor from compelling the debtor to attend the subsequent proceedings in a portion of the State remote from his residence or not appear. This was both reasonable and just. It certainly is unjust, and in many cases would be oppressive to compel a judgment-debtor to attend such proceedings at a place distant from his residence or place of business while, enjoined from using any money or property, he may have to pay his expenses or to pay an attorney for his services in appearing for him. The object and purpose of this amendment was to provide a remedy against such a course of procedure.

The law, as thus amended, remained in force until after the Code of Civil Procedure went into operation. Section 2434 of the Code of Civil Procedure was intended as a re-enactment of that portion of section 292 of the Code of Procedure which designated the judge before whom these proceedings might be instituted and continued, and which provided that where an order was made by a justice of the Supreme Court, all subsequent proceedings should be had before some justice in the judicial district where the judgment-debtor resided. (See Senate Committee's note to § 2434, and Mr. Throop's note to same section.) In the latter it is stated that this section is taken from section 292 and amended as required by sections 2432 and 2433 of the Code of Civil Procedure, and also as required by section 7 of chapter 545, Laws of 1874, relating to the Marine Court of the city of New York. It is then added: "The words 'where the judgment-debtor resides' have been omitted in the third sentence and the clause has been inserted in the fourth sentence, applying the corresponding provision to a case where the justice of the Supreme Court resides in a district other than that to which the execution was issued; because, in certain cases, the execution may issue to the county where the judgment-debtor has an office, and if he is a non-resident, the words expunged are meaningless." It is quite apparent that the commissioners who

drafted the Code of Civil Procedure did not intend to change the provision of section 292 of the Code of Procedure in relation to proceedings instituted before a justice of the Supreme Court, except to expunge the words "where the judgment-debtor resides," and insert in lieu thereof the words "embracing the county to which the execution was issued." This was the only change mentioned, and I think the only change intended.

I cannot think that it was the intent, either of the commissioners or of the legislature, to repeal this salutary provision entirely or in part. All admit that it was not intended that it should be wholly repealed. Why, then, should it have been re-enacted in part only? Can any good reason be assigned or suggested why the legislature should have purposely repealed this provision so far as applicable to an action in the Supreme Court, and re-enacted it as to an action in any other court? I can imagine none. Surely not because it would be less inconvenient or burdensome to the debtor in one case than the other, as it is manifest that such would not be the case. If no sufficient reason can be found for such a distinction, then it is at least fair to presume that the legislature did not intend to create it, unless the language employed is so clear and unambiguous as to show conclusively that such was the intent.

I do not think the language employed requires any such construction. It seems to me that the words "in that case" may well be construed as referring to a proceeding instituted before a justice of the Supreme Court, unlimited to a case where an execution was issued out of a court other than that. If it was limited to a case in a court other than the Supreme Court, then the provision that it might be returnable before the county judge, or special county judge or special surrogate of that county would seem to be inconsistent with the condition which must exist to authorize the justice to make the order. It is only when each of the judges before whom the proceeding might be instituted is absent or disqualified that a justice of the Supreme Court can make the order, and if that is the only case where he must make the subsequent proceedings returnable before another judge, it would be idle, if not absurd, to provide that he might make the proceeding returnable before a class of officers who were unable to act.

It seems to me that the obvious purpose of both the commissioners

and the legislature was to re-enact the provisions of section 292 of the Code of Procedure in relation to an order made by a justice of the Supreme Court, and to provide that in all cases where the order is made by such a justice, the subsequent proceedings must be had in the judicial district embracing the county to which the execution was issued, or in that county or an adjoining one, if before the other officers mentioned. I am also of the opinion that that section may be construed so as to carry out that purpose and intention without doing violence to the language employed.

Thus far I have discussed this question without reference to the authorities bearing upon it. In *Browning v. Hayes* (41 Hun, 382), this question was before the General Term of the second department, and that court held that where an order was made by a justice of the Supreme Court to examine a judgment-debtor residing in another judicial district, the order must be made returnable before a justice of that district, although the execution was issued out of the Supreme Court. In deciding that case, it was held that the words "in that case," in section 2434, did not alone refer to orders made for inferior judges, but were intended to embrace all orders made before a justice of the Supreme Court. This case was cited with approval in *Merrill v. Allin* (46 Hun, 626), and the same doctrine is laid down in 3 Rumsey's Practice, 435, and Fiero on Special Proceedings, 514. Here, then, we have a decision of the General Term of one of the departments of the State upon the question involved in this case. That case has been so far approved by the General Term of another department as to be cited by it. This construction of that section has also been accepted by the authors of the recent text books on the subject, and the rule as stated has been laid down as the true rule governing the practice in such a case. It seems to me that the uniformity in the decisions of the several departments which should prevail, and the impropriety of unsettling the practice upon this question, requires us to follow the principle of the decision in the *Browning Case*.

It is true that Judge VANN, at Special Term, held otherwise (*Blanchard v. Reilley*, 11 Civ. Pro. Rep., 279), but that was evidently before the case of *Browning v. Hayes* was reported. Moreover, it seems to me that the construction placed upon this statute by the

Special Term in that case, as well as in the case at bar, was too exact and literal and did not express the full intent and purpose of this statute.

I am of the opinion that the Special Term erred in denying the defendant's motion to set aside the orders granted by Judge KENNEDY, and that for such error the order should be reversed, with ten dollars costs, and that the appellant's motion should be granted, without costs.

MERWIN, J., concurred.

HARDIN, P. J. (dissenting):

Pardee v. Tilton (20 Hun, 76; S. C., affirmed, 83 N. Y., 623) expressly held, that under section 292 of the Code of Procedure, it was irregular for a justice of this court to issue an order for the examination of a judgment-debtor in a county outside of the district wherein the judge resided, in which there was no provision "requiring the evidence and proceedings had before the referee" to be returned to the justice making the order. In delivering the opinion in that case, quotation was made from section 292 of the Code of Procedure, as follows: "All subsequent proceedings shall be had before some justice in the judicial department where the judgment-debtor resides, to be specified in the order." Following that quotation, the opinion continues: "The direction should, therefore, have been that the referee report the testimony and proceedings to the justice designated in the order before whom the subsequent proceedings were to be had, and not to the justice who made the order." *Pardee v. Tilton* was decided at a General Term in the first department in January, 1880.

In *Shults v. Andrews* (54 How., 376), decided at a Special Term held by me, the provision of section 292, already quoted, came under consideration, and it was there said in the opinion: "This clause contains a limitation in respect to the jurisdiction of justices who grant such orders. * * * But debtors are not required to appear in subsequent proceedings before a justice residing out of the judicial district in which the debtor resides. The right to order him to appear in subsequent proceedings out of the district is taken away. The provision also requires the order to specify some "justice in the judicial district where the judgment-debtor resides." Such

specification is imposed by the statute." The provision in section 292 of the Code of Procedure, to which we have already referred, is omitted from section 2434 of the Code of Civil Procedure, and the latter section provides that "either special proceeding may be instituted before a judge of the court out of which * * * the execution was issued." This language is broad and confers in terms upon the judges of the court out of which the execution issued, power and jurisdiction over special proceedings instituted before them in cases where the execution was issued out of the court in which they are judges. Following this general language is a provision for a class of cases "where the execution was issued out of a court other than the Supreme Court;" and after enumerating the class and providing for certain facts being shown by an affidavit, it is provided that if the facts enumerated in the section are thus shown, "the special proceeding may be instituted before a justice of the Supreme Court." Then follow the words: "In that case, if he does not reside within the judicial district, embracing the county to which the execution was issued, the order made or warrants issued by him must be returnable to a justice of the Supreme Court residing in that district, or the county judge or the special county judge or special surrogate of that or an adjoining county, as directed in the order or warrant." We think the words "in that case" refer only to the words found in the second provision of the statute, conferring power upon justices of the Supreme Court in the exceptional cases enumerated, to wit: Where the execution was issued out of a court other than the Supreme Court. And it is made to appear by affidavit "that each of the judges before whom the special proceeding might be instituted, as prescribed in this section, is absent from the county, or, for any reason, unable or disqualified to act." Such is the interpretation placed upon the section by VANN, J., in *Blanchard v. Reilly* (11 Civ. Pro. R., 278), and the views expressed in that opinion meet with our approval.

In delivering the opinion in *Browning v. Hayes* (11 Civ. Pro. Rep., 223; S. C., 41 Hun, 382), BARNARD, P. J., observed: "Section 2434 of the Code of Civil Procedure is not very plain. It can be gathered therefrom, by a very strict reading, that it is only in cases where a Supreme Court justice makes the order in place of other inferior judges, that a provision must be inserted making

the order returnable before a Supreme Court justice or other local magistrate of the judicial district where the order is to be executed." We prefer this portion of the opinion as a correct interpretation of the section to the general expressions used by him in the latter part of his opinion, in which he reaches a contrary interpretation of the section under consideration. In a note to that case it appears that Mr. Justice BARTLETT entertained and expressed substantially the same views as are found in the opinion of VANN, J., in *Blanchard v. Reilly* (*supra*), and that result seems to be approved by KENNEDY, J., and SMITH, J., the first of whom made the order in question, and the second approved of the same, as appears by his memorandum delivered at the Schuyler Special Term found in the appeal-book before us.

Merrill v. Allin (46 Hun, 623) does not aid the contention of the appellant; in that case the judgment was recovered in the Court of Common Pleas in the city and county of New York, and an execution was issued thereon to the sheriff of that county, that being the county where the judgment-debtor resided; and subsequently a transcript of the judgment was filed in Ontario county, and an execution was issued to that county; and it was alleged that certain parties held property of the judgment-debtor, and upon an affidavit to that effect application was made to the county judge of Ontario county; and it was finally held in that case that the county judge had not jurisdiction to entertain the proceedings.

We are of the opinion that the order appealed from should be affirmed.

Order reversed, with ten dollars costs and disbursements, and motion granted, without costs.

WILLIAM J. SLOAN, APPELLANT, v. JOHN I. BIRDSALL, ESTELLA B. STOUGHTENBURGH, ELLA A. OVER-STREET AND WILLIAM McDONALD, AS TRUSTEES OF THE ESTATE OF JOHN I. BIRDSALL, RESPONDENTS.

Trust for the benefit of the grantor and others—invalid as against the creditors of the grantor to the extent of his interest only.

One Birdsall executed a deed of trust to trustees by which he conveyed his property, both real and personal, in trust, first, to sell so much as should be necessary to pay all the just debts of the grantor, second, to manage or sell the residue of the lands; third, during the natural lives of the grantor and his wife, or the survivor of them, to dispose of the interest upon the net proceeds of the real and personal property by first paying the grantor an amount sufficient to clothe, support and maintain him, and such other allowance as the trustees should in their discretion deem proper, and by dividing the remainder equally between the grantor's wife and his daughter.

When the daughter attained the age of twenty-one years one-third of the trust estate was to become hers absolutely, the other two-thirds to remain in the hands of the trustee, the income to be distributed as above stated during the lives of the grantor and his wife. On the death of either another third of the estate was to become the absolute property of the daughter, and upon the death of both the grantor and his wife the daughter was to have the whole estate.

Two days thereafter Birdsall's wife executed to the same trustees a like deed of trust of all her property, both real and personal.

Held, that as the primary object of each deed, or one of the primary objects thereof, was to transfer the property of the grantor to trustees, in trust for the support and maintenance of such grantor, it was void, under 2 Revised Statutes (185, § 1), as against the creditors, so far as that particular trust was concerned, but was valid, as against the creditors of the grantor, so far as the trusts for the benefit of others were concerned.

That the trusts which were valid did not fail, because the instrument creating them also contained a trust that became invalid when the separate rights of creditors were invaded.

Semble, that a transfer does not come within the provisions of this statute, and is not made invalid thereby, where the use of the interest reserved to the grantor is merely incidental and partial, and is to vest or result after the execution of some active and lawful purpose for which the trust was primarily made.

APPEAL by the plaintiff William J. Sloan from a judgment of the Supreme Court, entered in the office of the clerk of the county of Otsego on November 23, 1886, with notice of an intention to bring up for review upon such appeal the said judgment, the decision of the court, its findings of law and fact, its refusals to find as

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requested, and the whole thereof, and all the proceedings upon which they, or any of them, were founded.

J. B. Holmes, for the appellant.

F. R. Gilbert, for the respondents.

MARTIN, J.:

This was a creditor's action to set aside a trust deed made by the defendant Birdsall to the defendant McDonald and another as trustees. It was made on the 14th day of November, 1867, and conveyed all of the grantor's property, both real and personal, in trust: 1. To sell so much as should be necessary to pay all the just debts of the grantor. 2. To manage or sell the residue of the lands. 3. During the natural lives of the grantor and his wife, or the survivor of them, to dispose of the interest upon the net proceeds of the real and personal property by first paying the grantor an amount sufficient to clothe, support and maintain him, and such other allowance as the trustees should, in their discretion, deem proper, and by dividing the remainder equally between the grantor's wife and his daughter. When the daughter attained the age of twenty-one years one-third of the trust estate was to become hers absolutely, the other two-thirds to remain in the hands of the trustees, the income to be distributed as before stated during the lives of the grantor and his wife. On the death of either, another third of the estate was to become the absolute property of the daughter, and upon the death of both the grantor and his wife, the daughter was to have the whole estate.

On November 16, 1867, the defendant Estella B. Stoutenburgh, who was then the wife of the defendant Birdsall, gave a deed to the same trustees of all her property, both real and personal, in trust for the same purposes as were specified in the deed made by the defendant Birdsall.

The defendant McDonald and his co-trustee accepted the trust under both deeds and proceeded and continued to execute the same until 1868, when they were relieved therefrom and new trustees were appointed by the Supreme Court. Subsequently the trustees thus appointed were in turn relieved, and the defendant McDonald was again appointed by that court as sole trustee to carry out the trust created by said deeds, so far as the same then remained unexecuted.

Before the last appointment of the defendant McDonald, in an action in the Supreme Court, a decree was duly made and entered adjudging that one-third of the trust funds in the hands of the trustees belonged absolutely to the daughter of the grantors, and that the trust was ended as to that one-third. It was also further adjudged therein that the trust was ended as to the defendant Estella B. Stoutenburgh, then Estella B. Clark, and certain specified property in the hands of the then trustees was directed to be delivered to the daughter of the grantors, and certain other of the property in their hands was directed to be delivered to the defendant Estella B. Stoutenburgh. The trust as to the defendant Birdsall was, however continued, and the defendant McDonald was appointed as trustee to execute such trust; and said decree also provided that the said trustee should "pay to the said John I. Birdsall, for his board and clothing, such sum as in his discretion may be necessary for that purpose, and at such time or times as he may deem proper, not exceeding in any one year the net income of said estate."

The trust fund now in the hands of the defendant McDonald, as such trustee, consists of personal property of the value of between eight and nine thousand dollars, which was originally the personal property of the defendant Birdsall. The real purpose of this action was to procure the application of that fund, or the income thereof, to the payment of the plaintiff's judgment. The appellant claims that the deed given by the defendant Birdsall, at least as to the personal property thereby conveyed, was void as to subsequent as well as existing creditors, because it conveyed to the defendant McDonald and his co-trustee the grantor's personal property in trust for his own use. It is declared by statute that "all deeds of gift, all conveyances and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors existing or subsequent, of such person." (2 R. S., 135, § 1.)

The Special Term held that this statute did not render the transfer in question void, even as to the personal property conveyed, for two reasons: First. Because the trust fund was not created by the defendant Birdsall alone. Second. Because it was not for the use of the grantor alone. This conclusion was based upon the cases of *Curtis v. Leavitt* (15 N. Y., 9), and *Shoemaker v. Hastings* (61 How., 79).

In the former case a trust deed was given to secure certain bonds that were issued by the North American Trust and Banking Company. The deed provided that the trustees named therein should, after selling or collecting the property transferred, pay the bonds issued by that company, and after the payment of such bonds and all costs and charges, the trustees should hold the bonds and mortgages assigned in trust for said trust and banking company and dispose of them as it should direct. In that case the court held that the trusts created by that deed were not void under the statute on the ground that it was a conveyance in trust for the use of the grantor, it being the opinion of the court that the statute applied only to conveyances, etc., primarily for the use of the grantor, and not to instruments for other and active purposes, where the reservations to the grantor were incidental and partial (page 295). This was all that was decided in that case. While there are certain expressions in the opinions delivered therein which, when not read in connection with the remainder of the opinion, might seem to uphold a somewhat different doctrine, yet, when the whole of the opinions on that branch of the case are read together they show quite clearly that the decision of the court was a fair epitome of the opinions delivered.

In the *Shoemaker Case*, a father sold two of his sons his farm and personal property, for which they agreed to pay a specified sum by paying the liens thereon and certain debts of the father, and also agreed to give him a mortgage for \$1,000 and pay his two minor children \$150 each when they became of age. In that case the court held that the transfer was intended as an actual alienation of the property, and did not fall within the condemnation of the statute.

The doctrine which may be fairly deduced from these cases is, that a transfer does not come within the provisions of this statute where the use or interest reserved to the grantor is merely incidental and partial, and is to vest or result after the execution of some active and lawful purpose for which it was primarily made, as is illustrated in the case of a chattel mortgage, assignment or pledge, as security for the payment of a debt and the like. Neither of those cases was like the case at bar, and in both the principle that a creditor could enforce his debts against any use or interest reserved by the grantor was expressly recognized.

In the case of *McLean v. Button* (19 Barb., 450) it was held that

a transfer of personal property, the consideration of which was the future support of the grantor, his wife and children, was within the statute and void as to the subsequent creditors. In *Young v. Heermans* (66 N. Y., 381), where a transfer was in trust for the use of the grantor during his life, and for the payment of his debts after his death, it was held to be void under the statute. In *Wilson v. Robertson* (21 N. Y., 594), where an assignment appropriated the property of an insolvent firm to the payment of the individual debts of one of the parties, it was suggested by the court that it was void as a trust for the benefit of the assignors, or one of them. (See, also, *Kingsland v. Tompkins*, 5 Week. Dig., 378.)

An examination of this statute, and of the authorities bearing upon it, leads us to the conclusion that where the primary object, or one of the primary objects, of a conveyance is to transfer the property of the grantor to trustees, in trust for his own support and maintenance, it is within the statute and void as to creditors, so far as that particular trust is concerned, although it contains other trusts which are valid. We are of the opinion that the trust deed given by the defendant Birdsall was valid as between the parties, and as to all of the world except his creditors; and that it was also valid as to his creditors so far as the trusts for the benefit of his wife and daughter were concerned. The trusts that were valid did not fail, because the instrument creating them also contained one that became invalid when the superior rights of creditors were involved. (*Curtis v. Leavitt*, 15 N. Y., 124; *Scott v. Guthrie*, 25 How., 514; *Rome Exchange Bank v. Eames*, 4 Abb. Ct. App. Dec., 95.) But we are also of the opinion that, so far as it provided for the support of the grantor, the trust deed was within the statute, and void as to his subsequent creditors as well as existing ones.

The fact that, at or about the time of the execution of this trust deed by the defendant Birdsall, his wife made a similar trust deed for the same purposes and trusts, or that the trust deed by the grantor contained other trusts which were valid, does not relieve the conveyance by the defendant Birdsall from the operation of this statute. The doctrine that this statute can be rendered nugatory or ineffectual, either by procuring another to join with the grantor in creating a trust which is within its condemnation, or by joining

valid trusts with those that are declared to be void as to creditors, cannot, we think, be sustained.

As the appeal book shows that the property now in the hands of the trustee is personal property which originally belonged to the defendant Birdsall, and that, by the terms of the conveyance, he is entitled to his support from the income thereof, it follows that the income can be reached by his creditors. Section 1873 of the Code of Civil Procedure provides that the final judgment in a judgment-creditor's action "must direct and provide for the satisfaction of the sum due to the plaintiff out of any money, thing in action or other personal property belonging to or due to the judgment-debtor, or held in trust for him, which is discovered in the action."

The complaint was sufficient to justify the court in awarding the relief to which the plaintiff was entitled. "Under our present system of practice a plaintiff is not to be turned out of court, when an answer has been interposed, because he has prayed for too much or too little or for wrong relief." (*Murtha v. Curley*, 90 N. Y., 377.) We think the court erred in dismissing the plaintiff's complaint and that the judgment should be reversed.

Judgment reversed and a new trial ordered, with costs to abide the event.

HARDIN, P. J., and MERWIN, J., concurred.

Judgment reversed on the exceptions and a new trial ordered, with costs to abide the event.

SIMEON HILL, APPELLANT, v. WILLIAM McDONALD,
AS TRUSTEE OF THE ESTATE OF JOHN I. BIRDSALL;
ESTELLA B. CLARK AND ELLA A. OVERSTREET,
RESPONDENTS.

Trust—statute of limitations applicable to a claim which the trustee is directed to pay, where payment thereof is refused by him.

One Birdsall having executed a deed of trust conveying certain property to trustees, one of the purposes of which trust was to pay all the just debts of Birdsall, a creditor of Birdsall presented to the trustees for payment a claim, payment of which was refused by them in December, 1868. The claim was again presented

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and payment refused in 1875, and again in 1880. Thereafter, and in May, 1888, an action thereon was brought against the trustees.

Held, that the claim was barred by the statute of limitations; that even if a direct, positive and technical trust, such as belongs exclusively to the jurisdiction of a court of equity, existed in favor of the claimant, the statute of limitations commenced to run against the plaintiff's debt from the time when payment was refused by the trustees.

The rule which exempts such a trust from the bar of the statute of limitations is subject to two qualifications:

First. That no circumstances exist to raise a presumption from the lapse of time of an extinguishment of the trust.

Second. That no open denial or repudiation of the trust is brought home to the knowledge of the *cestui que trust*, which requires him to act as in the case of an asserted adverse title.

APPEAL by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of Otsego on the 31st day of October, 1889, after a trial at a Special Term of the Supreme Court held in Otsego county, at which a decision was rendered that the plaintiff's complaint be dismissed upon the merits, without costs.

John B. Holmes and *W. J. Palmer*, for the appellant.

F. R. Gilbert, for the respondents.

MARTIN, J.:

This action cannot be regarded as a judgment-creditor's action, as the plaintiff was not a judgment-creditor. The purpose of the action was to recover the plaintiff's claim against the trust estate in the hands of the defendant McDonald. The trust was originally created by deeds from John I. Birdsall and his wife to the defendant McDonald and another as trustees. One of the purposes of the trust was to pay all the just debts of the defendant Birdsall. The defendant McDonald and his co-trustee duly qualified and acted until relieved by the Supreme Court. In April, 1868, they were relieved from the trust and F. R. Gilbert and John Bell were appointed as trustees in their place. Gilbert and Bell acted until November 2, 1874, when Bell was relieved and Gilbert was appointed sole trustee. In November, 1881, Gilbert was relieved from the trust and the defendant McDonald was again appointed as trustee in his place.

When the trust deeds were given John I. Birdsall was justly indebted to the plaintiff's assignor in the sum of twenty-five dollars, for which Birdsall gave his promissory note, which became due in April, 1868. This note was transferred by the payee to E. L. Gustin before its maturity. On September 25, 1873, Birdsall gave a new note for this debt, and another renewal note was given by him in November, 1879.

After the first note became due, and as early as the month of December, 1868, the then holder presented it to the trustees for payment and payment was refused. It was again presented in 1875 and payment demanded, which was again refused. In October, 1880, the then trustee requested the holder of the note to send it to his counsel for allowance. This was done, but the note was disallowed by the trustee, and has never been paid. The note, with all his equities and claim against the trust estate, were assigned by the holder to the plaintiff on January 3, 1883. At the time of the trial the debt and interest amounted to sixty-six dollars and forty-nine cents. This action was commenced in May, 1883. The trial court held that the plaintiff's claim against the trustees of this estate was barred by the statute of limitations. The correctness of that determination presents the only question involved in this case.

When this action was commenced more than fifteen years had elapsed since the plaintiff's debt became due, and nearly that time had elapsed since it was presented and rejected by the trustees of this estate. It was, therefore, barred by the statute of limitations, if the statute is operative as to such a claim. The plaintiff contends that an express trust was created between the trustees and the creditors of the defendant Birdsall, and that the statute of limitations has no application to such a case.

If we assume that a direct, positive and technical trust, such as belongs exclusively to the jurisdiction of a court of equity, existed in favor of the plaintiff's assignor, the question is, whether the rule invoked applies to this case. The rule which exempts such a trust from the bar of the statute is subject to two qualifications that seem to be as well established as the rule itself. These qualifications are, first, that no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust; and second, that no open denial or repudiation of the trust is brought home to the knowledge

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of the *cestui que trust*, which requires him to act as upon an asserted adverse title.

As we have already seen, the plaintiff's claim was positively rejected and payment denied by the trustees. This action upon the part of the trustees must, we think, be regarded as an open and positive denial or repudiation of the trust as to the plaintiff's assignor and of the debt which the plaintiff now seeks to enforce. It was brought home to the knowledge of the assignor in a manner which called upon him to assert his rights. We think this case comes within the second qualification of the rule stated; that the statute commenced to run against the plaintiff's debt from the time when payment was refused by the trustees; and that the court properly held that this claim was barred by the statute of limitations.

We find no merit in the claim that this action was on a sealed instrument. (*Loder v. Hatfield*, 71 N. Y., 92.) Nor can we find anything in the case to justify the conclusion that the refusal to pay the debt had been waived, or that the defendant was estopped from insisting upon the statute as a bar by reason of the request of the trustee to the holder of this note to send it to the counsel to be presented on an accounting had by such trustee.

We are of the opinion that the case was properly disposed of by the Special Term, and that this appeal should not prevail, and the judgment should be affirmed, with costs.

HARDIN, P. J., and MERWIN, J., concurred.

Judgment affirmed, with costs.

FRANK B. CHAPMAN, RESPONDENT, v. GEORGE F.
COMSTOCK, APPELLANT.

Director of a corporation — liability of, in case of a failure to file an annual report — statute of limitations — presumption that prohibited powers have not been exercised — a deposit made in violation of law becomes due immediately.

In an action brought to charge a director of a corporation with a debt thereof, by reason of the failure of the directors to file an annual report of the condition of the corporation as required by law, it appeared that the plaintiff held a promissory note made by the Onondaga Coarse Salt Association, which, being about to

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wind up its business, deposited with the American Dairy Salt Company (Limited) the sum of \$10,880.90, and the plaintiff received from the latter company a pass-book in his name in account with said American Dairy Salt Company, containing the following credit: February 11, 1882, cash, \$10,880.90, and withdrew from such account, April 30, 1885, \$4,800; June 1, 1888, \$1,000, and July 11, 1888, \$1,000.

Held, that as there was no express, explicit agreement obligating the plaintiff to allow his money to remain on deposit with the American Dairy Salt Company, that the amount of money mentioned in the account became due from the corporation the moment it was deposited, and the defendant, as one of its directors, became liable to pay the same at that time, and that consequently the three years prescribed by the statute as the limitation of time applicable to the enforcement of such statutory penalty having elapsed, that the plaintiff's right to recover against the director was barred.

That subsequent defaults in filing the annual report after the liability was complete did not aid the plaintiff.

That as the American Dairy Salt Company (Limited) was, by the thirteenth section of chapter 611 of 1875, expressly authorized to borrow money, and as it was not authorized to carry on a banking business, it was to be presumed that the corporation in receiving this money kept within its authorized powers and did not transgress the law by assuming to exercise banking powers, and that the transaction was, therefore, to be considered a loan rather than a deposit.

That even if it should be assumed that a deposit had been made, and not a loan, such deposit being in violation of the law, the corporation became indebted for money had and received, and liable to an action therefor at the time that the deposit was made.

APPEAL by the defendant George F. Comstock from a judgment, in favor of the plaintiff, for \$9,062.67, entered in the office of the clerk of the county of Onondaga on the 21st day of January, 1890; and also from an order, entered in said clerk's office on the 21st day of January, 1890, refusing a new trial and denying the defendant's motion therefor made on the minutes of the court on a trial at the Onondaga circuit.

The action was brought by the plaintiff, as a creditor of the American Dairy Salt Company (Limited), to recover his debt from the defendant, a director of the said company.

Prior to February 11, 1882, the plaintiff held a promissory note made by the Onondaga Coarse Salt Association, of which Thomas Molloy was treasurer. The American Dairy Salt Company (Limited) was organized in 1877, under chapter 611 of the Laws of 1875, and continued the business of manufacturing and selling salt until a receiver thereof was appointed in October, 1888. Molloy

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was also treasurer of the American Dairy Salt Company (Limited). While the Onondaga Coarse Salt Association was winding up its business it desired to pay and discharge its obligation to the plaintiff upon the note held by him, and did so by paying and delivering to the American Dairy Salt Company (Limited), on February 11, 1882, in cash \$10,880.90. The plaintiff received from the latter company a pass-book in which was entered, viz., "Dr. Frank B. Chapman in special account with the American Dairy Salt Company (Limited), Cr. February 11, 1882, cash, \$10,880.90." He received on account of such cash subsequently from the last named company the following sums, viz., "April 30, 1885, cash \$4,300; June 1, 1888, \$1,000; July 11, 1888, \$1,000." No further sums were paid to the plaintiff. Plaintiff in his complaint alleges:

"3. That the defendant, George F. Comstock, was a duly qualified, elected and acting director of the said the American Dairy Salt Company (Limited), during each of the years 1881, 1882, 1883, 1884, 1885, 1886, 1887 and 1888, and during all the times the defaults in making and filing the annual reports and certificates and appended reports, required by law, were made, occurred and continued as hereinafter stated.

"4. That the said, the American Dairy Salt Company (Limited), did not, within twenty days after the 1st day of January, in either of the years 1881, 1882, 1883, 1884, 1885, 1886, 1887 or 1888, or at any time in said years 1881 to 1888, inclusive, make a report in writing, as of January first, signed by the president and a majority of the directors of the said corporation, and verified by its president and secretary, stating the amount of its capital, the proportion thereof actually paid in, the amount, and, in general terms, the nature of its existing assets and debts, the names of its then stockholders, and the dividends, if any, declared since the last report of said corporation, and file the same in the office of the secretary of State, as required by law; that the said corporation did not make or file, in either of the years 1881, 1882, 1883, 1884, 1885, 1886, 1887 or 1888, or at any time thereafter, the annual report required and provided for by section 18, chapter 611, Laws of 1875, or by said section as amended."

In the defendant's answer he does not deny the allegations just quoted from the plaintiff's complaint; they are, therefore,

to be deemed, as they were deemed, true upon the trial. The answer of the defendant alleges that "said corporation was not organized for or authorized to do the business of banking, or to receive deposits of money, but, on the contrary, was forbidden by law from so doing or receiving the same, and the said alleged deposit was void as a deposit." And, as a further defense, he alleges "that the plaintiff ought not to have or maintain this action, because the same was not commenced within three years next after the accruing of said cause of action." The principal question of fact submitted to the jury upon which a verdict was made to turn by the learned trial judge, was whether or no the American Dairy Salt Company, when it acquired the money from the Onondaga Coarse Salt Association, so paid and delivered upon the assent of the plaintiff, received and held the same as "a loan or a deposit." Exceptions were taken to several rulings had upon the trial and to the charge as delivered, and to several refusals to charge as requested.

Andrew H. Green, for the appellant.

Knapp, Nottingham & Andrews, for the respondent.

HARDIN, P. J. :

Under chapter 611 of the Laws of 1875, the American Dairy Salt Company (Limited) was organized. In the eighteenth section it is provided that "every such corporation shall annually, within twenty days after the first day of January, make a report, which shall state the amount of capital, and the proportion actually paid in, the amount, and, in general terms, the nature of its existing assets and debts, and the names of its then stockholders, and the dividends, if any, declared since the last report. * * * And if any such corporation shall fail so to do, all the directors thereof shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such report shall be made." There was a failure to make a report according to the provisions of the section in January, 1882. The defendant was then a trustee of the corporation. The corporation became indebted to the plaintiff on the 11th of February, 1882. As soon as the corporation created the debt, the defendant, as one of its directors, became liable for the same.

In *Boughton v. Otis* (21 N. Y., 261), where a similar provision found in chapter 40 of the Laws of 1848, authorizing the formation of manufacturing corporations, was under examination, in the course of the opinion delivered in that case it was said: "The liability, when it has once attached, and upon whomsoever it has attached, remains fixed and unalterable." Plaintiff is seeking to enforce a liability that arises by reason of the provisions of the statute already quoted. As was said in *Merchants' Bank v Bliss* (35 N. Y., 416): "The action depends wholly upon the statute. There never was any such remedy or cause of action, in whole or in part, at common law." In dealing with the liability of directors similarly situated in *Jones v. Barlow* (62 N. Y., 202), the court said: "They are only liable to an action for debts actually due, and for which a present right of action exists against the corporation." And it was further held in that case that "the short statute of limitations only begins to run from the time a cause of action accrues, not from the time of default in making the report." That decision was made while section 92 of the Code of Procedure was in force. The rule remains the same under section 383 of the Code of Civil Procedure. It becomes important, therefore, to inquire how and when the "debt" that the American Dairy Salt Company (Limited) contracted, by and with the plaintiff, became due and payable. In considering this question, it may be observed that no written instrument was delivered to the plaintiff evidencing an indebtedness in clear and exact terms. This case is, therefore, unlike *Smiley v. Fry* (100 N. Y., 262), which was an action upon an instrument in the following words: "Due S. K. Ashton, M. D., trustee, \$4,000 returnable on demand. It is understood that this sum is specially deposited with us, and is distinct from the other transactions with said Ashton." In considering that instrument the court held that it was in the nature of a certificate of deposit, and, therefore, no cause of action arose thereon until a demand was made for the sum deposited. We fail to find in the words "special account," appearing in the pass-book which was delivered to the plaintiff, when read in the light of the oral testimony given upon the trial, any explicit agreement for forbearance. The circumstance that the word "cash" appears

opposite the amount of money for which the corporation became indebted is entitled to some consideration in determining the question of whether or not there was any agreement for time, but it has no controlling force. After a careful perusal of the evidence given upon the trial we are not able to say that it contains any express, explicit agreement obligating the plaintiff to allow his moneys to remain for any definite period of time. It is all consistent with the idea that if he did leave his money he would receive certain specified interest thereon ; if he did not leave it he could, at his own pleasure, obtain a recall of the same. Nor do we regard the circumstances that the plaintiff received on different occasions partial payments upon the sum of money for which the corporation was indebted to him, as indicative of any agreement that for any length of time his money should be in the possession of the corporation. We find nothing in the evidence which would necessarily defeat an action had such a one been brought the next day after the money was received by the corporation from the previous debtor. But it is argued by the learned counsel for the respondent that the debtor corporation received the moneys on deposit, and not as a loan. It may be observed that the testimony of Molloy bears quite as strongly in the direction of establishing a loan as it does in the direction of establishing a deposit. However, it is quite fair, in considering his evidence, to bear in mind that he said, while upon the stand, that he was not familiar with the distinction between a loan and a deposit. In considering the question whether it was a loan or deposit, it should be borne in mind that the receiving of deposits is an incident of banking and of banking corporations. The American Dairy Salt Company (Limited), was not authorized to carry on a banking business, indeed, it fell within the general provisions of the statute which prohibited that kind of business to such corporations. (See sections 3 and 4 of the Revised Statutes [7th ed.], vol. 3, p. 2124 ; *N. Y. State Loan and Trust Co. v. Helmer*, 77 N. Y., 64 ; *Pratt v. Short*, 79 id., 445 ; and my opinion in *Pratt v. Short*, 53 How., 506 ; and the opinion of ANDREWS, J., in the same case sustaining the decision made at Special Term, 79 N. Y., 440 ; Id., 449.)

So it may be observed, in considering the question, that the American Dairy Salt Company (Limited) was, by the thirteenth section of chapter 611 of the Laws of 1875, expressly authorized to

borrow money. That section contains the following words: "It shall be lawful for all such corporations *to borrow money* for the legitimate purposes of such corporation." (Session Laws of 1875, p. 758.) It is more reasonable to suppose that the corporation kept within its authorized powers, than to believe that it transgressed the provisions of the prohibitive laws to which we have alluded. These views lead to the conclusion that the moment the corporation created the debt, the defendant, as one of its directors, became liable to pay the same; he had incurred the statutory penalty, and he remained liable during the next three years ensuing; at the end of the three years the short statute of limitations became a bar to the plaintiff's right of recovery. (Code of Civil Procedure, § 383; *Duckworth v. Roach*, 81 N. Y., 49.)

Plaintiff is not advantaged by the fact that there were several other defaults following those of 1881 and 1882 in making the annual reports. The subsequent defaults, after the liability was completed, did not aid the plaintiff. This question is put at rest by *Losee v. Bullard* (79 N. Y., 406). In that case, RAPALLO, J., said: "The appellants claim that the failure to file the certificate in each year after 1868 created a new liability on the part of the defendant, and that, consequently, the default in 1873 and the subsequent years can be resorted to for the purpose of maintaining this action and avoiding the effect of the statute of limitations. We think this position untenable, for two reasons. In the first place the statute requires that the action be brought within three years from the time the cause of action accrued. The action was for a statutory penalty. This penalty, if it ever was incurred, was completely incurred in 1868, and the testator of the plaintiffs could then have brought his action therefor. . We do not think that the continuance of the default in successive years had the effect of renewing the liability of the respondent as would a new promise or a payment on account in the case of a liability founded on contract."

In *The Rector, etc., v. Vanderbilt* (98 N. Y., 175) a similar question arose, and Judge DANFORTH, speaking for the court, said: "Neither the continuance of the default nor subsequent omissions on the part of the company to make a report could, as to the debt in question, either renew the old liability or create a new right of action. The statute operates upon the remedy, and the omission

of the creditor to pursue it cannot stop its running. The liability of the trustee was imposed by statute, and the benefit and suit therefor are limited to the creditor as the one aggrieved. In such a case, when the statute of limitations begins to run, nothing subsequent will stop it. But the question now before us is directly within the principle of the decision of this court in *Losee v. Bullard* (*supra*), and permits no further discussion. It can make no difference that the company in this case continued to transact business. The plaintiffs were not required to sue the trustee, but could not, by omitting to do so, prevent the application of the statute."

If it be assumed that the transaction amounted to a deposit on the part of the plaintiff with the American Dairy Salt Company (Limited), and that such deposit was a violation of the restraining acts, and that the corporation became indebted for money had and received, and liable to an action therefor in accordance with the doctrine of *Pratt v. Short* (*supra*), it may be observed that the corporation, under such circumstances, had no valid agreement for time entitling it to set up a defense. It may be further observed that the defendant, if he became, by reason of the transaction, liable under the statute as for a debt of the corporation, or for the money had and received by the corporation, that liability occurred more than three years preceding the commencement of this action, and was, therefore, barred. The foregoing views lead to the conclusion: (1.) That the verdict ought to have been directed in favor of the defendant, or a nonsuit granted. (2.) That the verdict is against the evidence. (3.) That the several exceptions taken to the refusals to charge, present error.

The judgment and order should be reversed upon the exceptions and a new trial ordered, with costs to abide the event.

MARTIN and MERWIN, JJ., concurred.

Judgment and order reversed upon the exceptions and a new trial ordered, with costs to abide the event.

GEORGE W. PALMER, RESPONDENT, v. EUGENE H.
CONANT AND GEORGE F. CONANT, APPELLANTS.

Negligence — effect of payment of money to the father of an injured minor and the execution of a release by the minor.

In an action to recover damages resulting from a personal injury received by the plaintiff through the alleged negligence of the defendants, it appeared that when the injuries were received by the plaintiff he was under twenty-one years of age, and that the defendants paid to his father the sum of \$100, and a paper was thereupon executed by the plaintiff purporting to be a release of all claims against the defendants by reason of the injuries to the plaintiff.

Held, that the payment of the money to the father was not a bar to the right of the plaintiff to recover damages in this action.

That, in such an action, evidence of the amount of wages which the plaintiff is earning is admissible upon the question of damages.

APPEAL by the defendants from a judgment of the Supreme Court, entered in the office of the clerk of the county of Oneida on the 28th day of April, 1890; and also from an order denying a motion for a new trial made on the minutes of the court, entered March 13, 1890.

The action was tried at the Oneida Circuit before the court and a jury, and a verdict was rendered by the latter, in favor of the plaintiff, for the sum of \$550.

The action was brought to recover damages for personal injuries received by the plaintiff through the alleged negligence of the defendants on the 19th of December, 1888, while the plaintiff was in the employ of the defendants in the operation of their saw-mill on the south side of Mad river, at Camden. James Gerow was defendants' foreman in their chair shop and factory operated in connection with the mill, and on that day he instructed the plaintiff to go to the dam and "help put on slash boards." It appears by the plaintiff's evidence that while he was engaged in putting on the flush boards "the north end of the log slid off of the abutment and threwed him (Chapman) down stream, and the board I had, with the pressure of the water, carried his end down, and the end I had carried me up. Just as I got on the pivotal part of the dam the south end of the log came off and struck my leg and dragged me down the apron of the dam ten or twelve feet. The log lying on the north end of

the dam first loosened and went down stream, then it loosened from the south abutment, so they left both abutments. These flush boards were of hard wood, an inch and a half thick, twelve feet long, and averaged from eighteen to twenty-four inches in width. They raised the water. When the log struck me it dragged me off the apron of the dam and ten or twelve feet down stream. The water took me down under and the logs went to the north side of the creek and the water washed me on the south side, and I got out the best way I could; I don't know how. Below the dam I should think the stream was seventy or eighty feet wide in high water. The logs were washed on the north side. When I got out the bones in my left leg were sticking out through two pairs of pants into the water. It was from about an inch below the knee to the ankle."

It appeared that the round timbers, without being fastened on the bottom, were allowed to rest on the smooth abutments with no planking or fastening to hold them in place, other than a piece of two-inch plank nailed below them, and when the pressure of the water came they gave way.

George F. Morss and C. D. Prescott, for the appellants.

P. H. Fitzgerald, for the respondent.

HARDIN. P. J.:

We think the evidence presented a question of fact for the jury. It was for the jury to determine whether the defendants were guilty of negligence. It was for the jury to determine whether the dam was so constructed as to secure safety, and whether the principle upon which it was constructed was reasonably safe, and whether reasonable guards to secure safety were provided by the defendants. (*Newall v. Bartlett*, 114 N. Y., 404; *Pantzar v. Tilly Foster Iron Mining Co.*, 99 id., 372.)

It appears by the evidence that the plaintiff was not present when the scantling were put down, and knew nothing of the manner in which they were fastened. The jury may properly have found upon the evidence that the plaintiff had no knowledge or appreciation of the defects which led to the accident, and that he was not chargeable with having voluntarily taken the risks incident to the situation in which he was placed. Whatever question there was

upon that subject, we are of the opinion that it was one for the jury to determine. (*Benzing v. Steinway & Sons*, 101 N. Y., 547.)

(2.) Plaintiff was asked during his examination as a witness: "Q. How much wages did you earn a week from Conant?" To this question the defendants objected, that it was incompetent and immaterial, and in dealing with the objections the court observed: "It is received only as an element of damages sustained by the plaintiff." * * * The defendants took an exception and the witness answered: "Five dollars a week." It is to be observed that there was no objection to the form of the question; apparently it called for the wages he had been receiving prior to the injury. We think such evidence was competent. In *Beisiegel v. New York Central and Hudson River Railroad Company* (40 N. Y., 9) it was held, viz.: "In an action to recover for personal injuries, evidence of the amount the plaintiff is earning at his trade, at the time of and immediately preceding the accident, is admissible upon the question of damages."

(3.) In the course of the cross-examination of the physician and surgeon who attended the plaintiff, he was asked for his opinion in respect to the condition the plaintiff's leg would have been in at the day of trial if he had "positively and speedily" obeyed instructions given by the physician. The question was objected to as incompetent and immaterial, and the court sustained the objection and the defendant took an exception. Upon looking into the evidence following, given by the witness, we find that he, in effect, answered the question. The witness says, viz.: "I did not have any trouble in setting the bones, they came together very nicely, and stayed so until he got off the cot bed, and if they had been kept where I first set them, there would have been no difficulty in the union of these pieces of bones."

The witness added at a later stage of his testimony that "the plaintiff was a restless patient; the bone was broken in a good many pieces; it was crushed, and that would make any man restless; I told him that rest was imperative, and in the fore part of the treatment administered opiates to him to quiet his pain."

Considering the evidence that the witness gave, we are not inclined to say that any prejudicial error was committed preventing an answer to the question as it was first framed upon the subject

embraced therein. Some other rulings were made upon questions of evidence, which do not require from us any special consideration, as we are of the opinion that no prejudicial error was committed.

(4.) When the injuries were received by the plaintiff he was under twenty-one years of age; and on January 7, 1889, the defendants paid to his father the sum of \$100, and a paper was executed by the plaintiff on that occasion purporting to be a release of all claims against the defendants by reason of the injuries to the plaintiff's leg. When that paper was executed the plaintiff was still a minor, being only twenty years, eight months and seventeen days of age. It is to be borne in mind that the father of the plaintiff was entitled to his services until he became of age, and, therefore, he was entitled to receive of the defendants such sum as he had lost by reason of the injuries sustained disabling the plaintiff from earning wages. Where a minor is injured the parents have a right of action, and the child also has a right of action. (*Cuming v. Brooklyn City R. R. Co.*, 109 N. Y., 99; *Traver v. Eighth Ave. R. R. Co.*, 4 Abb. Ct. App. Dec., 422.)

It appears by the evidence that the check for the \$100 was given to the father of the plaintiff at his house, and that the plaintiff was not there; and that when the plaintiff signed the paper he received nothing. We think the payment of the money, under the circumstances, to the father of the plaintiff does not stand in the way of the plaintiff's right of recovery.

When *Green v. Green* was tried before me at Special Term in Onondaga county, I found that the defendant, while an infant, had conveyed a certain piece of real estate to his father for the sum of \$400; having spent and wasted the money, he had no means or property whatever, and subsequent to his becoming twenty-one years of age he returned to the premises and took possession of them without any restoration to his father of the money that he had received; and in an action of trespass brought by the father I held that the plaintiff could not maintain the action. In delivering the opinion in that case upon an appeal taken to this court (7 Hun, 494), GILBERT, J., says: "The court below, we think, properly gave judgment for the defendant. An infant cannot properly bind himself to his prejudice, but whenever the act done may be for his benefit, it will not be void, but he has an election when he comes of

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age to affirm or avoid it. (2 Kent's Com., 233, *et seq.*, and cases cited.) Mere acquiescence, without acts, does not amount to an affirmance." That case was removed to the Court of Appeals and the judgments of the Special and General Terms affirmed. (*Green v. Green*, 69 N. Y., 553.)

We think we ought to allow the verdict to stand, and the judgment and order should be affirmed, with costs.

MARTIN, and MERWIN, JJ., concurred.

Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. JOHN KIEF, APPELLANT.

What acts and statements of one Conspirator are competent against the other — evidence — record of acquittal of one of two parties indicted for murder — admissibility of it on the separate trial of the other conspirator.

Although, during the continuance of a conspiracy, the acts and declarations of either conspirator in furtherance of the conspiracy are competent evidence against the other, the declarations of either before the formation of the conspiracy or after the consummation of the offense are not admissible.

On the trial of an issue in a criminal action, as to whether the accused aided and abetted another in the commission of the crime, a judgment of acquittal rendered upon the trial of that other person for such crime is properly rejected. (PARKER, J., dissenting.)

APPEAL by the defendant John Kief from a judgment of conviction of murder in the first degree, rendered on the 6th day of October, 1886, after a trial before the Court of Oyer and Terminer of the county of Madison.

Adelbert D. Howard died on the 17th of December, 1884, and the indictment upon which the defendant was tried charges that his death was caused by the felonious act of Carrie C. Howard and the defendant by administering to the deceased arsenic. Carrie C. Howard had a separate trial before a jury at an Oyer and Terminer held in January, 1885, and was acquitted by the verdict of the jury. The deceased was buried on the eighteenth of December, 1884. His

body was exhumed on the 7th of January, 1885, and taken to an undertaker's room in the village of Peterboro and a *post mortem* was held upon the body; and again it was returned to the grave and remained there until January twenty-third, when it was again taken up and taken to the undertaker's room and remained there four days. An inquest was held on the 28th of January, 1885, at Peterboro, and at the close of the inquest the coroner issued a warrant upon which Carrie C. Howard and the defendant were arrested and committed to jail in Morrisville. The defendant was sentenced to be executed on the 26th of November, 1886.

Joseph I. Sayles, for the appellant.

H. M. Aylesworth, district attorney, and *E. N. Wilson*, for the People, respondent.

HARDIN, P. J.:

Section 29 of the Penal Code provides as follows: "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime is a principal." The theory of the prosecution is that the defendant aided and abetted Carrie C. Howard in the commission of the crime of murder. She was married to the deceased in 1878, and had various differences and quarrels with him until in 1882, when she separated from him. She was induced to return to her husband by means of a transfer made of his property to her. In the month of October, 1884, defendant became an employee, and, as such, a member of the Howard family. And it is claimed that while he was thus employed he joined the wife of the deceased in a conspiracy to cause the death of her husband, Adelbert D. Howard. The evidence indicates that, from some time in the month of October, 1884, down to the time of the death of the deceased, the defendant and Mrs. Howard were much in each other's company. Together they visited Oneida, Cazenovia, Canastota, Morrisville and Clockville, and, on some occasions, drank intoxicating liquors in the hotels and saloons, she going with him in a carriage or a lumber wagon or on

loads of grain. It also appeared that he assisted her at times about the household work. It is claimed that on the 3d day of December, 1884, the defendant and Mrs. Howard went to Oneida together, a distance of about fourteen miles from the Howard farm, and that while there Mrs. Howard made a purchase of arsenic in the name of the defendant, and that a day or two after this purchase the deceased was taken ill, having all the symptoms of arsenical poison. From that affliction he apparently partially recovered, and by the evidence it appears that on the 11th of December, 1884, Kief was again in Oneida, and while there purchased an ounce of arsenic at the drug store of Dyer. A day or two thereafter Howard was again taken violently ill, having similar symptoms and somewhat aggravated. The symptoms continued to increase and he grew worse, until the night of the 17th of December, when he died. The evidence fully reveals his symptoms, which indicated arsenical poisoning; and a *post mortem* was held and an analysis made of a portion of the body by a chemist, and the results reached tend to indicate that Howard came to his death by reason of having taken arsenic in his stomach. From the testimony of Dr. William Smith, the chemist, who made an analysis of portions of the body, it appears that he found in the liver the equivalent of a grain and a half of white arsenic, and in the stomach and its contents one-eighth of a grain, and in a piece of muscle one-twentieth of a grain, and in some other portions examined by him four-tenths of a grain. It appeared by the evidence that the defendant and Carrie C. Howard were the persons who took care of the deceased during the sickness alluded to. Some evidence was given of the declarations of the defendant, tending to support the theory of the prosecution, and upon all of the evidence it is insisted, in behalf of the people, that a conspiracy had been formed to cause the death of the deceased, and that in pursuance of that conspiracy he was poisoned, and that the defendant aided and abetted in the commission of the crime. In *Kelley v. The People* (55 N. Y., 566) it was said: "A conspiracy may be proved, as other facts are proved, by circumstantial evidence, and parties performing disconnected overt acts, all contributing to the same result, and the consummation of the same offense, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confeder-

ates in the commission of the offense." In the same case it was also held that, "where there is sufficient evidence to justify the conclusion that different persons, charged with a crime, were all acting with a common purpose and design, although it does not appear that there had been a previous combination or confederacy to commit the particular offense, yet the acts and declarations of each, from the commencement to the consummation of the offense, are evidence against the others." Following the principles just quoted, it may be assumed that the evidence was sufficient to warrant the jury in finding a conspiracy between the defendant and Carrie C. Howard to accomplish the death of the deceased, and it may be said while such a conspiracy existed, the acts and declarations of either, in furtherance of the conspiracy, were competent evidence. However the declarations of either before the formation of the conspiracy, or after the consummation of the offense, do not come within the rule.

In *New York Guaranty and Indemnity Company v. Gleason* (78 N. Y., 504) it was held, viz.: "Having established a conspiracy, proof of the acts, admissions and declarations of any one of the conspirators in pursuance and furtherance of the criminal enterprise, and in reference thereto, is competent. But the statement of one of them as to a past transaction accompanying no act done in furtherance of, or in connection with such enterprise, is not competent against the others." Mr. Greenleaf lays down the rule (3 Greenl. on Ev., § 94) as follows: "The evidence of what is said or done by the other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending and in furtherance of their design; what was said or done by them before or afterwards not being within the principle of admissibility." This rule was stated and reaffirmed in *People v. Gorham* (16 Hun, 93).

In *People v. McQuade* (110 N. Y., 307) Judge ANDREWS, in speaking upon the subject, said: "The admission of this evidence was in contravention of the settled rule that only the acts and declarations of a co-conspirator, done in furtherance and execution of the common design, are admissible against one of the conspirators on trial for the common offense, and that when the conspiracy is at an end, and the purposes of the conspiracy have been fully accomplished, or the conspiracy has been abandoned, no subsequent act or declaration of one of the conspirators is admissible against another."

(1 Greenl. on Ev., § 111; 3 id., § 94; *People v. Davis*, 56 N. Y., 103; *N. Y. Guaranty, etc., Co. v. Gleason*, 78 id., 503.)

Nellie Laird testified that she was in the house of the Howard's on the 17th of April, 1884, and that she went with Mrs. Howard to Peterboro. She was then asked to state whether she had a conversation on that day with Mrs. Howard. The question was objected to as incompetent and improper and not evidence against the defendant. The objections were overruled and the defendant took an exception. The witness answered she had a conversation on that day, and when she was asked to state what Mrs. Howard said, similar objections were taken and overruled by the court and an exception was taken. The witness thereupon answered, viz.: "She was talking about Howard and said he misused her. He went to Syracuse in bad places and came home sick and she had to wait on him, and she said how mean he was. She said she had a mind to give him poison sometimes; she said she would if her courage hadn't failed her. I told her she wouldn't do any such thing, and she said she would." Thereupon the defendant's counsel moved to strike out this evidence as incompetent and immaterial, and that no foundation had been laid for it as against the defendant. The motion was denied and an exception was taken. The defendant was not present when this conversation took place. There is nothing in the case to indicate that a conspiracy had then been formed between Mrs. Howard and the defendant to cause the death of Howard; on the contrary, it is very apparent from the evidence that if there was any conspiracy formed between the defendant and Mrs. Howard it was formed long after this conversation. Hence we are of the opinion that the evidence was in violation of the rule which we have already stated, and that it was erroneously received.

When Simeon Reese was upon the stand, as a witness for the people, he was asked whether he heard Mrs. Howard call her husband names and when. This question was objected to and allowed, and an exception taken by the defendant. He said that in 1881 "she called him before he ate breakfast a son of a bitch, a poor-house pauper." We think her declarations on that occasion were not admissible. While David Jones was being examined in behalf of the people he was allowed to give statements and declarations made by Mrs. Howard in the summer of 1884, against the defendant's

objection and exception. By this witness' evidence it appears that he worked for the Howards from December, 1883, until the 7th of October, 1884, and that the defendant took his place, and that the defendant was there a week or ten days in the month of June. There is nothing in the testimony of this witness, or other evidence in the case to indicate that a conspiracy had been formed prior to or at the time of these declarations. We think their admission was, therefore, error.

(2.) The people put in evidence a deed executed in December, 1882, from Adelbert D. Howard to Carrie C Howard; and also a deed made by Mrs. Howard to Henry J. Mayor, dated January 21, 1885; and also a deed made by Mayor and Carrie C. Howard to the prisoner's counsel, dated January 27, 1885. Objections were taken to these records, and they were overruled and exceptions were taken to the rulings. Apparently the latter deed was given for the purpose of securing counsel for services in defending Mrs. Howard. Although the defendant may have been at the city of Rome when the latter deed was executed, the evidence nowhere discloses that he took any part in the transaction resulting in the deed. If there had been a conspiracy existing between the defendant and Mrs Howard, its purpose had been accomplished by the death of Howard on the seventeenth of December, and her act in transferring her property to her counsel on the 27th of January, 1885, apparently had no connection with the conspiracy, if one existed, prior to the death of Howard. We think the circumstance that the defendant went with her to the city of Rome, acting as a hired man or servant, on the occasion when she visited the office of her counsel and prepared the deed, did not render her act competent evidence against the defendant.

(3.) The defendant called as a witness one Elizabeth McGinnis, whose testimony was quite important for the defendant. During the cross-examination, for the purpose of impairing her credibility as a witness, she was asked to state that the farm that she and her husband lived upon joined the Howard farm, and that her husband held title to it, and that her husband had executed a mortgage upon his real and personal property. We think the inquiry into the acts of her husband in mortgaging his property were immaterial and ought not to have been received for the purpose of impairing her credibility as a witness.

(4.) We think the acts and circumstances attending the preparation of the body for burial, and what disposition was made of his clothing and ring, so far as they were known to the defendant, were correctly received in evidence.

(5.) The rule laid down by the Court of Appeals in *People v. Mondon* (103 N. Y., 221) seems to justify the admission of the testimony and declarations made by the defendant before the coroner. We think the rule stated in the *Mondon Case* was not departed from in *People v. Sharp* (107 N. Y., 427). (See, also, Code of Crim. Pro., § 395; *Hendrickson v. People*, 10 N. Y., 13.)

(6.) We are not persuaded that any error was committed in rejecting the record showing the acquittal of Carrie C. Howard of the crime charged in the indictment against her. (*Gelston v. Hoyt*, 3 Wheat., 316.)

In *State v. Mooney* (64 N. C., 54) it was held: "Where two are indicted for a battery, the one for the act and the other for using encouraging language at the time, the wife of the one who encouraged the beating is a competent witness for the other party. The legal effect of an acquittal of the other is not an acquittal of her husband." This case cites *State v. Rose* (Phil., 406); *State v. Ludwick* (Id., 401).

Other questions were pressed upon our attention by the learned counsel for the respective parties in the argument of the case, but we do not deem it important to consider them *in extenso*, as the views we have already expressed lead to the conclusion that a new trial must be awarded.

The conviction and judgment are reversed and a new trial directed in the Court of Oyer and Terminer of Madison county, to which court the proceedings are remitted.

MERWIN, J., concurred.

PARKER, J.:

Defendant was jointly indicted with one Carrie C. Howard for the crime of murder in the first degree. The charge is: That they jointly administered poison to her husband, Adelbert D. Howard, with the design to effect his death, and that he died from the effects thereof December 17, 1884. The defendants demanded separate trials, and Carrie C. Howard having been first brought to trial, a verdict of not guilty was rendered in her behalf, and a judgment of

acquittal entered thereon. Subsequently the defendant Kief being brought to trial, a verdict of guilty was rendered against him, and judgment entered thereon, from which he has appealed to this court.

After the people rested their case, the defendant offered in evidence the record of the acquittal of Carrie C. Howard, which was excluded by the court under the people's objection that it was incompetent, irrelevant and immaterial, to which ruling an exception was duly taken by the defendant.

For this alleged error, among others, the defendant asked that a new trial be granted. One of the issues on trial was, whether the defendant did himself administer the poison by which the murder was effected. On such issue it is evident that the question, whether Carrie C. Howard was or was not guilty was entirely irrelevant. But another question in the case was, whether Kief aided and abetted her in administering the poison to her husband. If she was the only one who administered the poison, and Kief was, in fact, absent at the time and ignorant that it was then being done, yet, if he aided and abetted her in such a scheme, he was, under our present law, guilty as a principal equally with her, and the charge that *they* administered the poison would be sustained as to him.

The trial judge charged the jury to that effect, and much evidence was given on the part of the people tending to show that she committed the crime, and he aided and abetted her in doing it. On that issue it was clearly proper for defendant to give in evidence any fact tending to show that Carrie C. Howard did not commit such crime. Such a fact would clearly be relevant and material. The people proved many facts tending to show her guilty. The defendant might prove any fact tending to show her innocent. But the question is, whether the record of her acquittal was competent evidence upon the question of her guilt in favor of the defendant and against the people.

Prior to the enactment of section 29 of the Penal Code a person who merely counseled and abetted another in a scheme to commit a crime was not deemed a principal, and could not be convicted under an indictment charging him as such. (*People v. Katz*, 23 How., 93.) He was not considered guilty of the crime, but merely guilty as an accessory before the fact, and in order to hold him guilty as an accessory it was necessary to prove that the crime which

it was claimed he had aided and abetted had, in fact, been committed by the other party. For such purpose, and as relevant to that question, the record of conviction of the other party was held to be *prima facie* evidence against the accessory. It was not held to be conclusive evidence because the alleged accessory was not a party to it, but it was conclusive evidence that a conviction had been had, and it was *prima facie* evidence that such conviction was correct, and hence that the party had committed the crime. Neither party was, therefore, concluded by the record. The people might give additional proof to establish the guilt of the principal, and the accessory might, notwithstanding the conviction, give evidence to show that such crime had not been committed. (3 Greenl. on Ev., § 46; *Levy v. People*, 80 N. Y., 327; *Jones v. People*, 20 Hun, 545.) So a judgment of acquittal was *prima facie* evidence in behalf of the accessory upon the well-known principle that a judgment may not be used as evidence against one in whose favor it might not have been used had the decision been the other way. (*People v. Buckland*, 13 Wend., 592; *Case v. Reeve*, 14 Johns., 82; *Gelston v. Hoyt*, 3 Wheaton, 316, 317.)

Although the record of the principal's conviction has not been received as evidence against the accessory without considerable opposition in some courts, it seems to be thoroughly settled in this State that it is *prima facie* evidence against him; and inasmuch as such record may be used in favor of the people against one who is not a party to it, there does not seem to be any reason why it should not be used *against* the people who are a party to it. Assuming, then, that such is the rule, it would seem that the record of the acquittal of Carrie C. Howard in this case was *prima facie* evidence in favor of this defendant upon the issue last above stated. Such issue is precisely the same as if he had been on trial as accessory before the fact, viz., that he counseled and abetted Carrie C. Howard in administering poison to her husband. If she had been previously convicted, I do not see why, within the rule above stated, the record of her conviction would not have been *prima facie* evidence against him that she had committed the crime, and it would have been admissible, to prove that fact on the question of whether or not he aided and abetted her in so doing.

Now, under our Code, such an issue may arise under an indictment charging him or both as principals. Formerly it could not, but, nevertheless, in both cases it is the same issue to be tried and determined upon similar facts and controlled by the same rules of evidence. The use of the record was not merely to prove the conviction. It was the *guilt* of the principal that must be established, and not merely the fact of his conviction. (See 80 N. Y., 327.) Frequently the parties were tried together, one as principal and one as accessory, and in such cases there was no prior conviction of principal; but the jury were instructed to first decide on the evidence as to the principal's guilt, and unless he was found guilty the other was discharged. (See 20 Hun, 546.) So, also, the rule was not applicable to the trial of accessories merely. It was a rule of evidence applying to every case where the record became material to such an issue.

In the *Buckland Case* a party indicted for compounding a larceny sought to plead the acquittal of the person charged with larceny as a *conclusive* bar to his conviction. The court held that it was *prima facie* evidence only, and not conclusive. In *Maybee v. Avery* (18 Johns., 352), the defendant, in an action of slander justified the charge that plaintiff stole hens by the record of plaintiff's conviction for such a crime. The court held that it was *prima facie* evidence in defendant's favor, but not conclusive, and in such case Judge SPENCER says, that a verdict upon an indictment is an exception to the general rule that a judgment is evidence only between the parties or their privies, upon the same principle that when the matter in dispute is a question of public right or interest, all persons standing in the same relation as the parties are affected by it.

It seems to be the settled law of this State, that on an issue whether the accused aided and abetted another in the commission of a crime, the judgment rendered upon the trial of that other for the crime is *prima facie* evidence as to whether that other person did or did not commit the crime. Such an issue having squarely arisen and gone to the jury in this case, I conclude that the record of Carrie C. Howard's acquittal was competent evidence relevant to that issue, and that it was error to exclude it.

I concede that the acquittal of Carrie C. Howard was utterly immaterial on the question of whether defendant Kief, either alone

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or jointly with her, murdered the deceased by administering poison to him. So, also, I concede that such acquittal is no bar to the conviction of Kief on this indictment. But when it is sought to hold Kief on the ground that even though he were absent and took no part in administering the poison, he is guilty if he aided and abetted her in such act, an issue is put into the case that makes the question of her guilt a material and important one, and upon such issue the record of her acquittal is *prima facie* evidence in his favor. At folios 1740–1743 of the printed case, it appears that the jury were squarely instructed that they might find Kief guilty upon that theory, if the evidence warranted it; and, therefore, both by the charge and by the evidence introduced on the part of the people, such issue was put into this case, and being in, it was error to exclude any competent evidence relevant to such issue.

Conviction, order and judgment reversed and a new trial ordered in the Oyer and Terminer of Madison county, to which court the proceedings are remitted.

RICHARD M. ODERKIRK, APPELLANT, v. JAMES O. FARGO, AS PRESIDENT OF AMERICAN EXPRESS COMPANY, RESPONDENT.

Express company — responsibility of, for a trunk left at its office after a receipt therefor is signed and the charges are paid.

In an action brought against an express company to recover damages for the loss of the plaintiff's trunk, it appeared that the trunk reached the office of the company, at Watertown, on Saturday, and that the following Monday, in the forenoon, the plaintiff called at the office, stated that he wanted to take out some things that belonged to one Smith and then leave the trunk there until the following day or the next, to which the agent of the company replied that if the plaintiff paid the charges and signed the receipt book he could do so, and that it would be all right; whereupon the plaintiff paid the charges and signed the receipt book, took out the things, and then locked the trunk and left it at the office of the company. On the following Wednesday he went to the office and was informed by the agent that the trunk had been delivered to other parties the day before upon the assumption that the plaintiff had sent for it. The court, upon the ground that there had been a complete delivery of the trunk to the plaintiff, and that the company ceased to be liable in any capacity therefor,

and that the agreement with the agent that the trunk might remain did not bind the defendant, granted a nonsuit on the trial.

Held, that as the jury might have found that the agent of the company in making the arrangement for leaving the trunk was acting within the apparent scope of his authority, and that such arrangement was made before the payment of the charges and signing of the receipt, and as there had been no termination of the transaction with the company so far as the custody of what was left in the trunk was concerned, as that remained with it, as it had before, in the office of the company and under the control of its agent, that a proper case was presented for submission to the jury and that the nonsuit was erroneously granted.

APPEAL by the plaintiff Richard M Oderkirk from a judgment of Jefferson County Court, entered February 12, 1890, in favor of the defendant against the plaintiff, dismissing the complaint, with costs.

The action was commenced in Justice's Court and was brought to recover the value of a trunk and its contents which had been sent by direction of plaintiff by express from Stony Creek, Warren county, N. Y., to Watertown, N. Y., and carried over the defendant's line from Rome to Watertown, but not, as claimed by plaintiff, delivered to him. The plaintiff recovered before the justice; the defendant appealed to the County Court, and upon the trial there the plaintiff was nonsuited.

E. C. Emerson, for the appellant.

Thomas F. Kearns, for the respondent.

MERWIN, J.:

Upon the trial of this case it appeared that the trunk of plaintiff reached the office of the defendant company, at Watertown, on Saturday, October 26, 1889. The following Monday, in the forenoon, the plaintiff, who lived a short distance out of town, called at the office and found there his trunk. He testifies that on that occasion he said to the agent of the company, there in charge of the office, that he wanted to take some things out that belonged to one Smith and then leave the trunk there till the following day, or the next, to enable him to have it taken to his place by some teams drawing brick, and the agent replied that, if the plaintiff paid the charges and signed the receipt book, he could take the things out and leave the trunk and it would be all right; that he then paid the charges and signed the receipt, opened the trunk and took out some things, then locked it and left it there. Upon the following

Wednesday he went again to the office and was informed by the agent that the trunk had been delivered to other parties the day before, upon the supposition that the plaintiff sent for it. The plaintiff further testified that he never authorized any one to go and get the trunk, and had never received it. As to the delivery, the agent testified that two men with a team called at the office, asked for the Oderkirk trunk, said that the charges were paid and that it was receipted for, and that he then pointed out to them the trunk and they took it, and that he did not ask them for any order, or whether they had any authority from Oderkirk to send for it, and he didn't know who the men were.

The claim of the defendant is that, upon the plaintiff's evidence, there was a complete delivery to the plaintiff and the company ceased to be liable in any capacity, and that any agreement with the agent that the trunk might remain did not bind the defendant.

The court adopted this view and granted a nonsuit. The plaintiff asked to go to the jury upon the question whether there was such a delivery by defendant and acceptance by plaintiff as terminated the obligation of the defendant as a common carrier; also, on the question whether the delivery of the property by defendant's agent to a third party was such negligence as rendered the defendant liable as warehouseman; also, as to whether the defendant did not assume the obligation of gratuitous bailee, and was not guilty of such gross negligence in the misdelivery of the property as made it liable. The court denied each of these requests and the plaintiff excepted.

The property was allowed to remain at the express office for the convenience solely of the plaintiff. This, according to the doctrine laid down in *Fenner v. Buffalo and State Line Railroad Company* (44 N. Y., 505), would relieve the defendant from liability as a common carrier. In that case the goods, after the freight was paid and the receipt signed, were, for the convenience of both parties, allowed to remain over night in the freight-house of the defendant, and during the night the freight-house and goods were burned up without any fault or negligence of defendant. It was held that defendant could not be held as an insurer.

It does not, however, follow that because liability as a common carrier had ceased there was no liability at all. In *Tarbell v. Royal*

Exchange Shipping Company (110 N. Y., 170) it is said: "That in many cases a carrier's whole duty in respect to goods carried by him is not discharged by a constructive delivery, terminating his strict responsibility as a carrier. Although a consignee may neglect to accept or receive the goods, the carrier is not thereby justified in abandoning them, or in negligently exposing them to injury. * * * So long as he has the custody of the goods, although there has been a constructive delivery which exempts him from liability as carrier, there supervenes upon the original contract of carriage, by implication of law, a duty as bailee or warehouseman to take ordinary care of the property." Upon that basis the defendant in that case was held to be liable for a portion of the goods lost or taken by wrong parties during the process of delivery.

In *Matteson v. New York Central and Hudson River Railroad Company* (76 N. Y., 381), which was an action to recover for loss of baggage, the plaintiff upon her arrival at her destination gave her checks, three in number, to the baggage master for the purpose of obtaining one of her packages, and informed him that she desired to leave the other two there for a week or two. This the baggage master told her she could do by giving him the checks, and he assured her the trunks would be just as safe without the checks as with them. The checks and two trunks were thereupon left with him, and when plaintiff called for one of the trunks afterwards it could not be found, it having been delivered by the baggage master to a stranger. The baggage master was prohibited by the defendant from thus keeping baggage, and he testified that he so informed plaintiff, but this she denied. It was held to be a question for the jury whether there was a delivery of the trunk by defendant to plaintiff and a termination of its responsibility.

In the present case, according to the evidence of the plaintiff, the agent of the defendant, before the charges were paid and the property receipted, agreed that plaintiff might take away a portion and leave the balance, with the assurance that it would be all right. If this was so, it should not be said, as matter of law, that there was a delivery to and acceptance by the plaintiff of the whole. There was no termination of the transaction with the carrier. The custody of what was left remained as it had been before. It was in the office of the company and under the control of its agent.

But it is said that the agent of the company had no power to bind the company to the agreement or consent that the property be left. This seems to have been the main ground for the nonsuit. The agent testifies that he had no such authority, but he does not say that he so informed the plaintiff. If, as testified to by the plaintiff, and as might have been found by the jury, the arrangement for leaving the trunk was made before the payment of the charges and the signing of the receipt, and with a view to give the plaintiff a reasonable opportunity to send for his goods, it would be a matter within the apparent scope of the authority of the agent, managing there the business of the company, and would bind the company in the absence of any notice to the plaintiff of any restriction on the agent's authority. (*Curtis v. Avon, G. and M. M. R. R. Co.*, 49 Barb, 148; *Isaacson v. N. Y. C. and H. R. R. R. Co.*, 94 N. Y., 278; Story on Agency, § 126.) At least it should not be said, as matter of law, that the company would not be liable.

It follows that the nonsuit was improperly granted, and that the request of the plaintiff to go to the jury on the question of the negligence of the defendant as warehouseman should have been granted.

Judgment is reversed upon the exceptions and new trial ordered, costs to abide the event.

MARTIN, J., concurred; HARDIN, P. J., not sitting.

Judgment reversed on the exceptions and a new trial ordered, with costs to abide the event.

IN THE MATTER OF THE APPLICATION OF THE SPLIT ROCK
CABLE COMPANY TO ACQUIRE CERTAIN REAL ESTATE
OWNED BY CHARLES HUGHES AND OTHERS.

*Eminent domain — what must be shown by a tram-way company seeking to acquire
land — what is not a public use.*

In proceedings to condemn land under the right of eminent domain for the purposes of the road-way of an elevated tram-way company, incorporated under chapter 462 of the Laws of 1888, it is incumbent on the petitioner to show, first, a legislative warrant for such proceedings on its part; and, second, if the right is challenged, that the business which it is organized to carry on is public, and that the taking of private property for the purposes of the corporation is a taking for public use.

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The true criterion by which to judge of the character of the use is to determine whether the public may enjoy it by right or only by permission.

Where an elevated tram-way consists of two elevated cables about ten feet apart, on which boxes are run by means of a trolley or pulley, one line taking the boxes that have been filled, and the other line taking back the boxes that are empty, and there is no access at one end of the tram-way, except over a private road, so that the public cannot make use of it at that end, except at the will of the owner of such private road, and where the service of the tram-way is intended to subserve the interests of one particular company, and the general public have no opportunity to use it, except as there may be a surplus capacity after supplying the uncertain and increasing wants of such company, the tram-way company is not in the position of a common carrier, and land sought to be taken for its purposes cannot be deemed to be taken for public use.

APPEAL by Charles Hughes, James Hughes and Eugene Hughes, certain land holders, from an order of the Supreme Court, made at a Special Term thereof, and entered in the Onondaga county clerk's office, November, 1889, which held that no sufficient cause was shown against the granting of the prayer of the petitioner in the above-entitled matter as to the parcel of real estate described in said order, and appointed commissioners to appraise and ascertain the compensation to be made to such landowners, and directed the place and time of the first meeting of such commissioners.

The proceedings were instituted by the Split Rock Cable Road Company for the purpose of acquiring title to certain real estate for its purposes.

The petition of the applicant, verified October 15, 1889, alleged that it was incorporated on the 19th of June, 1888, under an act of the legislature entitled "An act to authorize the formation of elevated tram-way corporations and to regulate the same," passed June 2, 1888; that it was its intention to construct and finish a railroad, as stated in its articles of association, commencing at or near Split Rock in the town of Onondaga, and running thence by the most direct and feasible route, *via* the towns of Onondaga, Camillus and Geddes, in the county of Onondaga, and terminating at or near Onondaga lake in the town of Geddes; that \$10,000 for every mile of the road proposed to be constructed had been in good faith subscribed to the capital stock, and ten per cent thereof paid in; that the company had surveyed the land or route of its proposed road, and had made a map or survey thereof, by which its route or line was desig-

nated, and it had located its road according to such survey and filed certificates thereof, signed by a majority of its directors, in the office of the county clerk of Onondaga county, that being the only county through or in which the road was to be constructed; that its tramway or road had been completed and was in operation from a point about the northern line of premises in the town of Onondaga formerly owned by James Hughes, deceased, northerly through Onondaga, Camillus and Geddes to a point at the Erie canal at or near the works of the Solvay Process Company; that the real estate the petitioner sought to acquire is five and thirty-six one-hundredths acres in the town of Onondaga, its description being given, and the names and places of residence of those who own or claim to own the lands were stated to be Charles Hughes, James Hughes and Eugene Hughes, of Syracuse, and the Solvay Process Company of Geddes; that the described real estate was required and necessary for the purposes of the incorporation of the petitioner for the purpose of constructing and operating its road, and of erecting and maintaining necessary and convenient buildings, stations, fixtures and machinery for the accommodation and transaction of its business; that the petitioner had not been able to acquire title for the reason that the owners refused to sell for a reasonable compensation.

The present appellants answered, admitting that they owned the real estate described in the petition, and that the petitioner had constructed a double cable from Split Rock to the Solvay Process Company for the purpose of carrying stone to that company, and denying, in substance, all the other allegations. They also alleged that the petitioner was a private corporation for private uses; that the lands sought to be taken were not necessary for its buildings, but valuable quarry lands, and were only sought for the use of the Solvay Process Company, and that the Solvay Company owned, controlled and operated the petitioner as an adjunct to their business in the manufacture of soda ash, and that the cable-road company was intended for no other use.

Hogan & Stern, for the appellants.

Tracy, McLennan & Ayling, for the petitioner, respondent.

MERWIN, J. :

In cases of this kind, it is incumbent on the petitioner to show first a legislative warrant, and second, if the right is challenged, that the business, which it is organized to carry on, is public, and that the taking of private property for the purposes of the corporation is a taking for public use. (*Matter of Niagara Falls and Whirlpool R. R. Co.*, 108 N. Y., 373.)

The articles of association of the petitioner, which are acknowledged June 13, 1888, and filed June 19, 1888, state that the subscribers "have associated together as an elevated tram-way corporation to continue in existence for the period of fifty years, for the purpose of constructing, maintaining and operating an Elevated Tram-way between Split Rock and Onondaga lake, a distance of about four miles, both of which places are in Onondaga county." The amount of the capital stock is stated to be \$52,000 and the number of directors three. The number of shares that each subscriber agrees to take is set opposite his name and the aggregate amount so agreed to be taken is the full amount of the capital stock. Nothing is said in the articles as to what statute the incorporation is designed to be under, but it is claimed, and it may be inferred, that the incorporation is under chapter 462 of the Laws of 1888, entitled "An act to authorize the formation of elevated tram-way corporations and to regulate the same," passed June 2, 1888 and taking effect immediately.

By section 1 of that act, it is provided that any number of persons, not less than thirteen, "may form a company for the purpose of constructing, maintaining and operating an elevated tram-way, constructed of poles, piers, wire, rods, ropes, bars or chains, for the transportation of freight in suspended buckets, cars or other receptacles for hire; and for that purpose may make and sign articles of association, in which shall be stated the name of the company; the number of years the same is to continue; the places from and to which the said tram-way is to be constructed, maintained and operated; the length of said tram-way as near as may be; the name of each county in this State through or in which it is made or intended to be made; the amount of the capital stock of the company and the number of shares of which said capital stock shall consist, and the names and places of residence of the directors of the company, which shall not be less than three, who shall manage its

affairs for the first year, and until others are chosen in their places." By section 6 it is provided that every corporation formed under the act "shall have power and authority (1) to cause such examination and surveys for its proposed tram-way to be made as may be necessary to the selection of the most advantageous route, and for such purposes, by its officers and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto; (2) to lay out its tram-way and to construct the same as hereby provided." By section 7 it is provided that in case any company formed under this act is unable to agree for the purchase, use or lease of any real estate required for the purposes of its incorporation, it shall have the right to acquire title in fee to the same in the manner and by the proceedings provided by law for acquiring title to lands for railroad use by railroad corporations, under the provisions of chapter 140 of the Laws of 1850 and the several acts amending the same or supplemental thereto, so far as the same are applicable. By section 9 any corporation formed under the act has power and authority to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and transaction of its business. The act does not in terms provide that the property taken shall be deemed to be for public use, or that the tram-ways are to be constructed for public use.

The capital stock of the petitioner was all paid in, and in June, 1889, it completed its tram-way from Split Rock northerly to near the Erie canal, a distance of about three and a half miles, and since then it has been in operation. The tram-way consists of two elevated cables, held up on supports and parallel to each other, about ten feet apart, on which run buckets by means of a trolley or pulley, one line taking the buckets that have been filled and the other line taking back the buckets which are empty. The location of the southern terminus of this tram-way is upon the land of the petitioner, just north of the lands now desired to be taken, and is in a gorge about ninety feet lower than the Hughes land. This terminus seems to be the southern terminus of the line of the tram-way as indicated upon the map or profile originally filed by the company. The company has filed no map indicating that its route extended over the lands in question, and the original map filed by the company did not indicate that the lands in question were to be

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taken for the purposes of the company. In the vicinity of this southern terminus, as so located, the Solvay Process Company owns upwards of 100 acres of land, upon which are quarries, and which entirely surrounds the terminus as well as the Hughes lands, and shuts them out entirely from any highway. There is to the Hughes land a road, but it is owned by individuals, and is not a public road. Who are the owners of this private road does not appear. The highway is about 1,200 feet distant.

The northern terminus of the tram-way, as now built, is on the land of the Solvay Company, at the lime kiln of their works, about 500 feet from the Erie canal. The route of the tram-way, as projected, extends northerly some distance, over the Erie canal and the Central railroad to Onondaga lake.

The carrying capacity of the road, as now constructed, is testified to be 750 tons a day. They have thus far carried for the Solvay Company, 350 to 400 tons of stone a day, and seem to have been kept running night and day. They have not carried anything for any other party. The Solvay Company is a large concern and its business is increasing. The incorporators of the petitioner were practically all stockholders in the Solvay Company. The surplus of the capacity of the road, after supplying the Solvay Company is, according to the evidence of the president of the petitioner, to be devoted to public use in carrying, in buckets, freight offered to it by any person, suitable to the buckets and to the road. What that surplus may be, as the Solvay Company continues to develop, is uncertain. The evidence clearly shows that the business of the petitioner will be subservient to the Solvay Company. The road has thus far been entirely for its benefit.

The intention of the petitioner, as its president testifies, is to use the land in question to increase its terminal facilities by building tram-ways on the surface to facilitate the carrying of stone to the cable station, by erecting buildings for the storage of freight and for repair shops, and to furnish means of access. The petitioner has other land that might be used for terminal facilities, but it is not so convenient. Aside from stone, the chief subject for freight is said to be coal, and, in regard to that, the president testifies, "we intend to make a contract with some private individual to furnish him with coal, so that he can transport it or sell it to people in that

vicinity ; to establish a coal yard the same as anywhere, not that the Solvay Process Company or the Cable Company will establish a coal yard ; some individual will have to run it ; with whom we will make a contract to carry coal ; and we propose to limit that contract to one individual for the present." This would hardly be a public use.

The appellants own the property in question, and it consists of a valuable quarry. Their contention is that the only object of this proceeding is to compel them to sell it for the benefit of the Solvay Company.

If the question of public use is to be determined from the nature of the business of the Cable Company, as described in its articles of association, then there would be a failure to show a design to construct a way for public use. No such design is stated in the articles. An elevated tram-way is not necessarily public. It may or may not be. The public use or purpose should affirmatively appear. (*Attorney-General v. City of Eau Claire*, 37 Wis., 401.) If left optional with the future management of the company, it would at least be doubtful whether a good basis would be furnished for the exercise of the right of eminent domain. Nor does the statute of 1888 fix a public character upon such corporations except possibly by way of inference. The organizations under that act are not limited to roads for public use, nor is the property acquired declared to be for public use. In this respect it differs from the present railroad act (chap. 140 of 1850, §§ 1, 18) and from the act for the organization of pipe lines. (Chap. 203 of 1878, §§ 1, 20.)

The president of the company, however, testifies that it is the intention of the corporation to carry all freight that may be offered of the kind it can carry, up to the extent of its capacity. In other words, it is intended that the corporation shall be a public one in the nature of a highway. What action the board of directors, as such, may have taken on the subject does not appear. So that, apparently, there is nothing to prevent the board of directors or some future president from having a different view. The plant of the company has cost about fifty thousand dollars, so that the capital is substantially exhausted. Nothing is shown as to the means of the company for enlarging its boundaries or increasing its facilities.

The true criterion by which to judge of the character of the use is, whether the public may enjoy it by right or only by permission. (*Mills on Eminent Domain*, § 14 ; *Kettle River R. Co. v. Eastern*

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Ry. Co. of Minn., 41 Minn., 461.) The undertaking of a common carrier is to carry for all people indifferently. (2 Kent's Com., 598.)

If, in the present case, there is no access to the southerly terminal except over a private road, then the public cannot, at that end, use the cable except at the will of the owner of such private road, or of the Solvay Company, the owner of the surrounding territory. So, if the Cable Company is run subservient to the interest of the Solvay Company, and the general public have no opportunity to use it except as there may be a surplus capacity after supplying the uncertain and increasing wants of the Solvay Company, then the Cable Company is not in the position of a common carrier. The service of the Solvay Company is the main object; the service of the public is subordinate and contingent. For such a service the right of eminent domain should not be exercised. (*Matter of Application of Eureka Basin W. and M. Co.*, 96 N. Y., 42; *Matter of Niagara Whirlpool Ry. Co.*, 108 id., 375.) As said by RUGER, Ch. J., in *Matter of Staten Island Rapid Transit Company* (103 N. Y., 257), "the exercise of this power is in derogation of individual rights, and is always burdensome and often injurious to the owner beyond the power of pecuniary compensation to wholly redress, and should be allowed only when the necessity for the land clearly appears, and it proposed use clearly embraced within the legitimate objects of the power."

Having in view the manner and form of the organization of the petitioner, and its subsequent acts, the location of its southerly terminus and the absence of public approach, its private use thus far and the lack of opportunity for the public to use, except after the wants of another company are supplied, and its apparent subserviency to the interests of that company, and the contingent and uncertain character of any future development for the benefit of the public, we are of the opinion that the evidence does not establish the conclusion that the taking here sought to be made is for public use.

It follows that the order should be reversed and proceedings dismissed, with costs. (Code of Civ. Pro., § 3240; 96 N. Y., 42, 49, *supra*; *Matter of N. Y., L. and W. R. R. Co.*, 26 Hun, 592.)

HARDIN, P. J., and MARTIN, J., concurred.

Order reversed and proceedings dismissed, with costs. (Code of Civ. Pro., § 3240; 96 N. Y., 42; 26 Hun, 592.)

Cases

DETERMINED IN THE

SECOND DEPARTMENT

AT

GENERAL TERM,

December, 1890.

CHARLES BENNER, RESPONDENT, *v.* THE ATLANTIC
DREDGING COMPANY, APPELLANT.

Damage from blasting — negligence need not be shown.

In an action brought to recover for the damages which resulted to the plaintiff's dwelling by reason of the blasting of rocks at Hell Gate in the East river, at or near Long Island City, by the defendant while acting under a contract with the United States, the court charged the jury that the defendant was responsible for such injury, if it caused it, and refused to charge that to make the defendant liable it must appear that the work was done in a negligent manner.

Held, that the charge was correct.

APPEAL by the defendant, the Atlantic Dredging Company, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Queens on the 14th day of January, 1890, and also from an order denying defendant's motion for a new trial upon the minutes of the court entered in said clerk's office on the 13th day of January, 1890, after a trial at the Queens County Circuit before the court and a jury, at which a verdict was rendered in favor of the plaintiff for \$525.

The action was brought to recover the damages resulting from an injury done to the plaintiff's building, by reason of the blasting of rock in proximity thereto, by the defendant, which acted under a contract with certain United States government officials in removing

the rock from under the water at Hell Gate, in the East river, opposite Astoria, L. I.

Benjamin W. Downing, for the appellant.

Henry C. Wilcox, for the respondent.

PRATT, J.:

The verdict established that the blasting done by defendant at Hell Gate shook the walls of plaintiff's house, inflicting injury.

The court charged that, for such injury, defendant was responsible, and refused to charge that, to make defendant liable, it must appear that the work was done in a negligent manner.

We think the instruction was correct. If a desirable work cannot be done without shaking down a neighbor's house, it would seem that the work should not be performed unless the doer was prepared to make compensation for the injury inflicted.

That rule seems best to promote the general welfare. The public are not benefited by a change that inflicts an injury greater than the resulting benefit.

The judgment should be affirmed, with costs.

BARNARD, P. J., concurred; DYKMAN, J., not sitting.

Judgment and order denying new trial affirmed, with costs.

EDWARD McSORLEY, RESPONDENT, v. BRIAN G. HUGHES
AND JOSEPHINE S. HUGHES, HIS WIFE, APPELLANTS,
IMPLEADED WITH GODFRIED GALLINECK.

The admission of improper evidence in an equity case — not a ground for the reversal of the judgment.

Under the former practice in equity cases the examiner took all the evidence which was offered, and the chancellor decided upon the case so brought before him, and was supposed to disregard the improper and incompetent testimony, and the more recent practice of taking testimony in equity cases before the court has not so far changed the rule as to make the simple fact of the improper reception of evidence in such a case a ground for the reversal of the judgment on an appeal therefrom.

APPEAL by the defendants Brian G. Hughes and Josephine S. Hughes, his wife, upon questions of law and upon the facts, from a judgment of the Richmond County Court, entered in the office of the clerk of the county of Richmond on the 19th day of June, 1889, with notice of an intention on the part of the appellants to bring up for review, upon said appeal, the interlocutory judgment, entered in the above-entitled action in said clerk's office on the 21st day of November, 1888.

The action was brought for the purpose of compelling the specific performance of a contract made by the defendant Brian G. Hughes with the plaintiff Edward McSorley, dated the 22d day of December, 1886, and for other relief, including an injunction against the defendant Godfried Gallineck, to prohibit him from paying rent to Brian G. Hughes, and for the appointment of a receiver of the rents and profits of the property occupied by said Gallineck, and the other property described in said contract.

Hays, Greenbaum & Schram, for the appellants.

Lyman L. Settel, for the respondent.

PRATT, J. :

The testimony fully sustains the findings of fact. The transaction was clearly a loan of money. The papers executed must be regarded as security for a loan. At the expiration of the time of payment defendant, if he desired to cut off plaintiff's right to redeem, should have filed a bill for that purpose. Not having done so, plaintiff's tender was made in due time and should have been accepted and the property reconveyed.

Some exceptions were taken to the admission of testimony, and it is urged that a new trial should be granted upon that ground. But that has never been the practice in equity. Under the ancient practice, testimony in equity was taken before an examiner, who took all that was offered, and the chancellor decided upon the case so brought before him. Under that system there could not well be any question as to the proper reception of testimony. The judge was supposed to know what testimony was proper and what should be disregarded, and the recent practice of taking testimony in equity

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cases before the court has not so changed the rule as to make the improper reception of evidence a ground of reversal. (*Forrest v. Forrest*, 25 N. Y., 510.)

The proofs abundantly sustain the judgment, which must be affirmed, with costs.

BARNARD, P. J., and DYKMAN, J., concurred.

Final and interlocutory judgment affirmed, with costs.

MARY E. AKERLEY, RESPONDENT, v. LEWIS B. WHITE,
APPELLANT.

Landlord and tenant— injury to the tenant from defective stairs— liability of the landlord.

In an action brought by a tenant to recover the damages resulting from an injury received by him through the alleged defective condition of the stairs in the demised premises, the jury were charged that if the stairs at the time of the letting were weak, to an extent that could be easily ascertained upon inspection, a verdict might be rendered against the landlord.

Held, that this charge would impose upon the owner of real property the duty of active vigilance to see whether the premises he was about to rent were in good condition, and was erroneous,

That the law imposed upon the tenant the risk of such defects in the demised premises as were visible upon inspection.

APPEAL by the defendant Lewis B. White from a judgment of the Supreme Court, entered in the office of the clerk of the county of Dutchess on the 12th day of June, 1890, in favor of the plaintiff, with notice of an intention to bring up for review upon such appeal an order denying a motion for a new trial, made on the minutes of the court on the 12th day of June, 1890, and entered in said clerk's office.

The cause was tried before the court and a jury at the Dutchess County Circuit, and a verdict was rendered in favor of the plaintiff for the sum of \$5,000 for damages for injuries sustained by the plaintiff in falling down a cellar stairs in a house owned by the defendant, and leased by him to the plaintiff's father, the said stairs being claimed to have been out of repair.

E. A. Brewster, for the appellant.

H. A. Nelson, for the respondent.

PRATT, J. :

The general rule of law is, in *Robbins v. Jones* (15 C. B. [N. S.], 221), said to be : "A landlord who lets a house in a dangerous condition is not liable to the tenant's customers or guests for accidents happening during the term ; for, fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any."

The same rule was held in *Jaffe v. Hartean* (56 N. Y., 398), and we think must be regarded as settled law.

An apparent exception has been engrafted upon the rule to the effect that where a landlord retains in his control a portion of the building, he owes a duty in respect to such portion to the people who, with his consent, come upon the premises. (*Camp v. Wood*, 76 N. Y., 92.) But we are not aware of any rule, where a whole building is rented to a single tenant, which imposes upon a landlord the duty of active vigilance to make sure that it is in all respects safe.

Where the defects are apparent upon inspection, and the landlord does not resort to any device or subterfuge to prevent the tenant from learning the condition of the premises, the rule of *caveat emptor* would seem to do justice between the parties.

A different rule seems to have been applied at circuit. The jury were charged that, if the stairs at the time of letting were weak to an extent that could be easily ascertained upon inspection, a verdict might be rendered against the landlord. This would impose upon the owner of real property the duty of active vigilance to see that the premises he is about to rent, in this instance a dwelling, are in good condition. We think the law puts upon the tenant the risk of such defects as are visible upon inspection.

From these views, it follows that the judgment should be reversed and a new trial ordered, costs to abide the event.

BARNARD, P. J., concurred ; DYKMAN, J., not sitting.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.

HENRIETTA A. LOUGHEED, APPELLANT, v. THE DYKEMAN'S BAPTIST CHURCH AND SOCIETY, SO-CALLED, RESPONDENT, IMPLEADED WITH JAY LOUGHEED AND OTHERS.

When an estate, given "at the death" of the testator's wife and conditional upon its continued use by the devisee, vests.

By his will a testator provided: "At the death of my wife I give and devise all that part of my real estate situate in the said town of Southeast * * * to the Baptist Church and Society of Dykeman's Station, to be used by said church and society as a parsonage forever; and whenever said society ceases to use the same as a parsonage, the same shall revert to my heirs-at-law."

Held, that the remainder did not vest in the church or society during the life of the wife.

That as the devisee could not alien or dispose of the property, and could have no advantage of the devise until after the death of the wife, and there could be no right of property apart from the right of enjoyment, the devise was necessarily contingent upon the existence of the devisee at the termination of the estate of the wife, and was not intended to operate until that time, and that the church or society was entitled to take under the will in case it should then be incorporated.

APPEAL by the plaintiff Henrietta A. Lougheed from a judgment of the Supreme Court, entered in the office of the clerk of the county of Putnam on the 3d day of July, 1890, dismissing the plaintiff's complaint upon the merits.

The action was tried before the court, which rendered a decision in favor of the defendant, the Dykeman's Baptist Church and Society, dismissing the complaint upon the merits, with costs.

The action was brought for the purpose of having a devise contained in the second paragraph of the will of Amos C. Dykeman, deceased, declared null and void, and for a partition and division of the devised premises. The second item of the will was as follows:

"*Second.* At the death of my wife I give and devise all that part of my real estate situate in the said town of Southeast which lies southerly of the new road leading westerly from Dykeman's Station past the dwelling-house of Coles B. Fowler, to the Baptist Church and Society of Dykeman's Station, to be used by said church and society as a parsonage forever; and whenever said society ceases to use the same as a parsonage, the same shall revert to my heirs-at-law.

The real estate so intended as a parsonage includes my present dwelling-house and eighty acres of land, more or less."

Frederic S. Barnum, for the appellant.

Abram J. Miller, for the respondent.

CULLEN, J. :

We assume the law to be that if the remainder given to the defendant by the testator's will vested at the death of the testator, then the devise is void, because at such time the defendant was not incorporated, and that the subsequent incorporation of the defendant during the life of the life-tenant would not validate the devise. The law was so held in *Owens v. Missionary Society* (14 N. Y., 380), and *Marx v. McGlynn* (88 id., 368), and the rule is recognized in *Shipman v. Rollins* (98 id., 311). The question then arises whether the devise vested at the death of the testator or at that of his wife, the life-tenant. The language of the will is: "At the death of my wife I give and devise," etc. The natural reading of this language would postpone the devise till the death of the wife. But it must be conceded that the law so favors the immediate vesting of estates that ordinarily, under a long line of decisions, the word "at" would be construed to refer to the time of enjoyment of the estate, not of its vesting. We think that this case is taken out of the ordinary rule by the limitations imposed on the devise. By the will it is provided that the land devised shall be used as a parsonage by the society and church, and that when the society ceases to use it as a parsonage it shall revert to the testator's heirs-at-law. The devisee could, therefore, not alien or dispose of it. The testator never contemplated that the devisee should have any advantage of the devise till the death of his wife. The right of property and right of enjoyment were to go together, and under the will there could be no right of property apart from the right of enjoyment. If the society had been incorporated at the time of the testator's death and subsequently became extinct, the devise would have failed. It was thus necessary that the devisee should survive till the death of the life-tenant to receive the devise; and thus the devise was necessarily contingent upon the existence of the devisee at the termination of the life estate. We think, therefore, that we are justified in holding

that the devise was not intended to vest till the death of the wife, and if that construction be correct, the incorporation and existence of the defendant at that period will, under *Shipman v. Rollins* (*supra*), render it a competent devisee.

The judgment appealed from should be affirmed, with costs.

PRATT, J., concurred.

Judgment affirmed, with costs.

IDA K. HELWIG, RESPONDENT, v. THE MUTUAL LIFE
INSURANCE COMPANY OF NEW YORK, APPELLANT.

Insurance — statement, in the application for a life policy, of the name of the last physician attending the applicant — when a party making use of an affidavit is not estopped to deny its truthfulness.

In an action brought to enforce payment of a life insurance policy, it appeared upon the trial that the application for the insurance contained a statement by the deceased that the last physician by whom he was attended was Dr. Lange-man, whereas, in fact, Dr. Fahs had attended him at a later date.

The court, on that ground, was asked to direct a verdict in favor of the defendant. This it declined to do, but instructed the jury that, if the attendance of Dr. Fahs was for a real or supposed disease, the verdict should be for the defendant.

Held, that the request was properly denied; that the limitation was a correct one, as the purpose of the question put to the applicant was to ascertain the name, not of the last physician who attended him, but of the last one who attended him for a disease.

While, ordinarily, a party who makes use of an affidavit thereby represents it to be truthful, yet the verified statement of the attending physician accompanying the proofs of death under a policy of insurance, as it is required as a condition of the policy, cannot be regarded as legal evidence in favor of either party to an action upon the policy.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 9th day of April, 1890, in favor of the plaintiff, after a trial before the court and a jury at the Kings County Circuit, at which a verdict was rendered in favor of the plaintiff for the sum of \$5,675, and also from an order denying defendant's motion to set

aside the verdict and for a new trial, which was entered in said clerk's office on the 4th day of April, 1890.

The action was commenced to recover the sum of \$5,000 under a policy of life insurance issued by the defendant on the life of Richard W. Helwig.

Robert Sewell, for the appellant.

A. Simis, Jr., for the respondent.

PRATT, J. :

We do not perceive any principle upon which the statement of the attending physician, accompanying the proofs of death, can be regarded as legal evidence in favor of either party to the action. Ordinarily, it may be said that a party who makes use of an affidavit thereby holds it forth as truthful, but we think the present case is an exception to the general rule, for it was a condition of the policy that the proofs of loss should be accompanied by the statement of the physician who attended the deceased in the last illness. The questions were upon a printed blank furnished by the company. It is not to be supposed that the claimant could control the responses or was in any degree responsible for their correctness. Had the forwarding of the physician's affidavit been a matter of choice with the claimant, it might well be argued that the statement was put forward as truthful and was evidence against the party using it. But as the claimant had no option and was compelled by the contract to forward the statement, it cannot be used as evidence against her.

The application contained a statement by the deceased that the last physician by whom he was attended was Doctor Langeman. Evidence was given to the effect that Doctor Fahs attended him at a later date, and the court on that ground was asked to direct a verdict for defendant. That request was refused, but the jury was instructed that if the attendance was for a real or supposed disease, the verdict should be for defendant.

We think the limitation was a proper one. The subject brought to the attention of the applicant by the question was as to the physician last attending him for a disease. If a physician attended on the applicant to urge him to accept a nomination for an office, while within the literal terms of the question, it would not be within its real scope.

The evidence gave some ground to suppose that, at the instance of a third party, a physician called upon the deceased, who declined to take his medicines and care. We think the circuit judge correctly held that was not such an attendance as to violate the warranty.

The judgment must be affirmed, with costs.

BARNARD, P. J., and DYKMAN, J., concurred.

Judgment and order denying new trial affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. FREDERICK R. GILLMAN, APPELLANT.

Bail bond, not naming the offense — not enforceable.

A bail bond which does not indicate the offense with which the principal is charged, and for which the bail undertakes that he will appear and answer, is void; nor can such defect be supplied, by proof *aliunde* the bond, in an action not to reform, but to enforce, the undertaking of the surety after its alleged breach.

Where the surety does not undertake that the principal will appear to answer any particular charge, there can be no breach of the bond.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Dutchess on the 21st day of May, 1890, in favor of the plaintiff, after a trial before the court without a jury at the Dutchess County Special Term.

The action was brought to recover upon a recognizance or undertaking of bail, signed by the defendant Frederick R. Gillman, together with Frank Cava, which was as follows: "An order having been made on the 26th day of November, 1889, by Hon. DANIEL W. GUERNSEY, Dutchess County Judge, that Frank Cava be held to answer upon a charge of, upon which he had been duly admitted to bail in the sum of \$1,000, we, Frank Cava, defendant, of New Hamburg, Dutchess county, N. Y., and Frederick Gillman, of the City of Poughkeepsie, surety, hereby undertake that the above-named Frank Cava shall appear and answer the charge above mentioned, in whatever court it may be prosecuted," etc

Herman Frank, for the appellant.

Martin Heermance, district attorney, for the respondent.

PRATT, J.:

We think the bail bond in question in this action is void as it does not specify any charge which the principal is to answer. The authorities are uniform upon this subject. Although it is not necessary to state the charge with great particularity, it must indicate the offense with which the principal is charged and for which the bail undertakes he will appear and answer. (*People v. Rundle*, 6 Hill, 506; *People v. Blankman*, 17 Wend., 252; *People v. Graham*, 1 Parker, 141.)

No charge having been stated in the bond we think it was error to allow the defect to be supplied by further proof. Such testimony may be given to explain contracts, but not to vary or add to them. This is not an action to reform but to enforce the undertaking of the surety after its alleged breach, and the court is simply called upon to determine what, if any, liability exists. As the surety did not undertake that his principal would appear to answer any charge there has been no breach.

The judgment must, therefore, be reversed.

DYKMAN, J., concurred; BARNARD, P. J., not sitting.

Judgment reversed, with costs.

THOMAS WHEELER v. WILLIAM EMMELUTH, RESPONDENT.

OBED WHEELER, ADMINISTRATOR OF THE GOODS, ETC., OF
THOMAS WHEELER, APPELLANT.

Insolvent debtor's discharge — not vacated because the name of a creditor was misstated in the petition therefor.

The fact that, in a list of creditors contained in the petition for an insolvent's discharge, the name of Thomas Wheeler appeared, whereas properly the name of Obed Wheeler, as administrator of Thomas Wheeler, should have been entered, where there is no evidence that the petitioner was aware of the death of Thomas Wheeler, which had recently happened, does not oblige the court to set aside the order of discharge.

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It is not every omission or error in proceedings for the discharge of an insolvent which will render them void. If the proceedings are honestly prosecuted, the inclination and duty of the court will be to disregard errors that will not cause injury.

APPEAL by Obed Wheeler, administrator of the goods, chattels and credits of Thomas Wheeler, deceased, from an order made at a Special Term of the Supreme Court, held in the county of Westchester on the 17th day of May, 1890, canceling two certain judgments in favor of Thomas Wheeler against William Emmeluth and discharging the same of record, and directing the clerk of Westchester county to mark on the docket of said judgments in his office that the same were canceled and discharged of record.

The motion was made to discharge these judgments on the part of the defendant, William Emmeluth, pursuant to section 2182 of the Code of Civil Procedure, upon the ground that the defendant had been discharged from his debts as an insolvent debtor.

Michael J. Scanlan, for Obed Wheeler, administrator, appellant.

Jacob Levy, for the respondent.

PRATT, J. :

The principal defect urged against the insolvent's discharge is that in the list of creditors appeared the name of Thomas Wheeler, whereas, properly the name of Obed Wheeler, as administrator of Thomas, should have been entered.

There is no reason shown to suppose that at the time of making the application the petitioner was aware of the death of his creditor, which was then recent. Not every omission or error will make insolvent proceedings void. If honestly prosecuted, the inclination and duty of the court will be to disregard errors that have not caused injury.

The brief of the appellant states that one of the judgments canceled by the Special Term order was entered in a Justice's Court, and that being docketed in the county clerk's office it became a judgment of the County Court, and that the motion for discharge should be addressed to that tribunal. But the petition avers the judgment was entered in the Supreme Court on February 24, 1876. The opposing affidavit does not deny that such a judgment was entered, and the order appealed from directs the cancellation of such judgment.

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If it be that a judgment was entered on the 23d of February, 1876, in a Justice's Court, it is not aimed at or affected by this proceeding. It may well be that to cancel that judgment resort should be had to the County Court.

The order appealed from should be affirmed, without costs.

BARNARD, P. J., concurred ; DYKMAN, J., not sitting.

Order affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOHN M. SAMMIS *v.* THE BOARD OF SUPERVISORS
OF QUEENS COUNTY.

Supervisors — authority of, to appoint commissioners to lay out a highway.

Since the passage of chapter 773 of the Laws of 1873 a board of supervisors has no authority to appoint commissioners to lay out a highway, except upon the certificate of the commissioners of highways.

CERTIORARI to review the proceedings of the board of supervisors of Queens county in the matter of the appointment of three special commissioners to lay out a highway in the village of Oyster Bay, through premises of the relator on which are buildings and permanent structures occupied and used for the purposes of trade.

Thomas Young, for the relator.

Charles R. Street, for the supervisors.

PRATT, J. :

It seems plain that prior to 1873 the proposed highway could not have been laid out over the relator's property without his consent. That act only authorized such a laying out upon the certificate of the commissioners of highways. (Laws of 1873, chap. 773 ; Thompson on Highways [3d ed.], 220 ; 2 R. S. [Banks' 7th ed.], 1238, 1239.)

In this case no such certificate was obtained, but was refused by the commissioners, and there was, therefore, no power vested in the board of supervisors to appoint commissioners, and the commissioners so appointed had no power to lay out the road.

This road falls under the act of 1873 and under the previous act, chapter 314 of the law of 1838, as amended by chapter 164 of the Laws of 1848. The law of 1873 was made expressly to apply to such an application as this, and it contains an express prohibition against laying out such road, except upon the condition before referred to, viz., certificate of commissioners of highways. Whatever may have been the powers of the board of supervisors prior to 1873, it is plain that since that act either the owner's consent or the certificate of the highway commissioners is essential to the laying out of such a road.

It cannot be claimed that the act of 1838 was intended to provide a method by which a road could be laid out through buildings without the owner's consent; but it was the object of the act of 1873 to effect that purpose, but only upon the conditions therein expressed.

It may be further said that, irrespective of the act of 1873, we do not think a case was made for action upon the part of the board of supervisors, for the reason that it did not appear that the road was important, and that the commissioners of highways could not or would not act within the meaning of the act of 1838.

If the foregoing views are correct, it follows that the action of the board of supervisors was without authority and must be reversed.

BARNARD, P. J., and DYKMAN, J., concurred.

Proceedings and order laying out highway reversed.

JANE E. MERRITT, APPELLANT, v. JOHN W. S. GOULEY,
RESPONDENT, IMPLEADED WITH OTHERS.

Foreclosure of a purchase-money mortgage — answer setting up a breach of a covenant of seizin in the deed given by the mortgagee.

In an action for the foreclosure of a purchase-money mortgage, in which a judgment for deficiency is asked against the mortgagor, an answer setting up a counter-claim for damages arising by reason of a breach of a covenant of seizin contained in the deed of conveyance executed by the mortgagee to the mortgagor may be properly interposed.

McConihe v. Fales (107 N. Y., 404); *Kirtz v. Peck* (118 id., 222) distinguished

APPEAL by the plaintiff from an order of the Supreme Court, made at a Special Term thereof held in the county of Dutchess on the 12th day of August, 1890, and entered in the office of the clerk of the county of Westchester on the 15th day of August, 1890, which denied a motion made by the plaintiff for judgment on the pleadings.

The answer contained, among other things, the following allegation:

The defendant further answering the complaint of the plaintiff herein, as a separate and distinct defense and by way of counterclaim to the claim of the above named plaintiff, respectfully shows:

First. That the above named plaintiff and one George Merritt, her husband, on or about the 18th day of February, 1882, made, executed and delivered to him a full covenant warranty deed duly signed, sealed and acknowledged by said Jane E. and George Merritt, aforesaid, which said deed, in consideration of the sum of \$10,000, purported to convey to him, the above named defendant, the same premises and tract of land described in the mortgage set forth in the complaint herein, and by the same description therein contained, which said deed was thereafter on the 4th day of March, 1882, duly recorded in the office of the register of the county of Westchester, in Liber 1005 of Deeds, at page 296.

Second That upon receiving the aforesaid deed and relying upon the covenants therein contained, and the truth of the same, he, the above-named defendant, paid to the above-named plaintiff in cash the sum of \$3,750 (the sum required to make up \$4,000), \$250 having been heretofore paid the plaintiff in cash at the time of signing the contract for the sale and purchase of the premises described in the complaint herein, and in payment of the balances of the consideration expressed in the said deed, to wit, \$6,000, he made, executed and delivered to the above-named plaintiff, the bond and mortgage set forth in the complaint herein, which were, as in the complaint herein set forth, given to secure a part of the purchase-money of the premises described therein, and then purported to be conveyed by the plaintiff herein to the above-named defendant as aforesaid.

Third. That the said deed from Jane E. Merritt, the above-named plaintiff and her husband, to this defendant contained, among other things, a covenant of seizin and right to convey, of which the

following is a copy: "And the said parties of the first part for themselves, their heirs, executors and administrators, do covenant, grant and agree to and with the said party of the second part, his heirs and assigns that the said Jane E. Merritt, at the time of the sealing and delivery of these presents, is lawfully seized in her own right of a good, absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises with the appurtenances, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner aforesaid."

Fourth. Defendant further states, on information and belief, that the said Jane E. Merritt at the time of the sealing and delivery of the deed aforesaid to him, and which deed contained the covenants last above fully set forth, was not lawfully seized in her own right of a good, absolute and indefeasible estate of inheritance in fee simple in and to all and singular the premises and appurtenances described and mentioned in the said deed from her to the defendant above named, and which deed contained the aforesaid covenant, nor had she good right, full power and lawful authority to grant, bargain, sell and convey all of said land and appurtenances to the above named defendant, nor were said statements to that effect contained in said deed true, for the reason as plaintiff is informed and believes, that at the time of signing, sealing and delivery of the deed aforesaid from plaintiff herein to the above-named defendant, and the making of the covenants therein contained, Charles E. Purdy and Walter M. Purdy, who were then infants, both under fourteen years of age, were seized in their own right in fee simple, to an undivided half of the premises described in the complaint herein.

Fifth. That the defendant above-named has paid to the plaintiff above named, relying on the covenants and the truth thereof, contained in the deed above referred to, and fully set forth, the sum of \$900, as and for interest on the mortgage set forth in the complaint herein, and has also expended for improvements and taxes on the said premises the further sum of \$856.87, making in all the sum of \$1,756.87.

Sixth. And the above-named defendant, further answering, states and alleges: That he is ready and willing and hereby offers to sign, seal and deliver to the plaintiff a proper conveyance (in which his

wife will join) of the premises described in the complaint herein in order to place her in the same position in regard to said premises as she was prior to the purported conveyance thereof to him, and to account to and pay her for all rents received by him, on the above-named plaintiff surrendering to him and also canceling the bond and mortgage described in the complaint herein, and also paying to him the sum of \$4,000, with interest from February, 1882, and the further sum of \$1,756.87 paid by him for interest on said mortgage, taxes and improvements, with interest thereon, making in all the sum of \$5,756.87, with interest as aforesaid.

David Verplanck, for the appellant.

Michael H. Cardozo and *Edgar J. Nathan*, for the respondent.

PRATT, J.:

This is a foreclosure suit of a purchase-money mortgage wherein a judgment of deficiency is prayed for, in case a sale fails to produce an amount sufficient to pay the mortgage, with interest and costs.

The answer, among other matters, puts in issue the amount claimed to be due, by setting up a counter-claim for damages by reason of a breach of the covenant of seizin in the deed. The plaintiff moved to strike out the answer as sham and irrelevant, and for judgment upon it as frivolous.

It is a sufficient answer to this motion that it would require argument to prove that it was frivolous. It is only in cases where the answer is so clearly bad as to require no argument or illustration that the same can be stricken out as frivolous. (*Strong v. Sproul*, 53 N. Y., 497.) Again, that part of the order was not appealable under section 537 of the Code of Civil Procedure.

The answer is not sham, for it is not proved to be false, and it is not irrelevant if it sets up any defense that can be proved upon the trial. The defendant had a right to contest the amount due, and it was a proper way to do that by setting up a counter-claim.

If the plaintiff, at the time the deed was delivered, had no title to or possession of the property, there was a breach of the covenant of seizin at the instant of such delivery, which entitled the defendant to damages, and there is no reason in saying that he shall be driven to separate suit upon that covenant when proper relief can be

obtained in this one suit. The plaintiff asked for a personal judgment against the defendant upon an action of contract, and the defendant's claim arises out of contract and falls within the description of a counter-claim under the Code (§ 501). (*Hunt v. Chapman* 51 N. Y., 555; *Bathgate v. Haskin*, 59 id., 533; *Seligman v. Dadley*, 14 Hun, 186; *Wiltsie on Foreclosure*, § 376.) It is true that it has been held that a breach of the covenant of a deed without eviction cannot be pleaded in bar of a suit to foreclose a purchase-money mortgage.

In *McConihe v. Fales* (107 N. Y., 404) it is held that a failure of title is no defense to a foreclosure suit without an allegation of fraud in sale or an eviction. But in that case there was no breach of covenant set up as a counter-claim to reduce the amount due in equity upon the bond. The late case of *Kirtz v. Peck* (113 N. Y., 222) is to the same effect, but I find no case decided since the enactment of section 501 of Code of Civil Procedure which holds that a breach of the covenant of seizin cannot be set up as a counter-claim under such circumstances as exist here.

The order is affirmed, with costs.

DYKMAN, J., concurred; BARNARD, P. J., not sitting.

Order affirmed, with costs and disbursements.

CATHERINE McLAUGHLIN, RESPONDENT, v. WILLIAM W.
ARMFIELD, APPELLANT.

Fire escapes in a manufactory — duty of the owner to erect them, without notice from the commissioner.

Under the statute (§ 16 of tit. 14 of chap. 583 of the Laws of 1888), directing that any building occupied, or built to be occupied, as a manufactory "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioner," the duty rests upon the owner to bring the subject before the commissioner and obtain his direction in the premises; and where an accident occurs, because of the absence of such fire-escapes from the building, the owner cannot avoid responsibility by alleging that the statute does not declare absolutely that fire-escapes shall be erected by the owner, but only that "such fire escapes and doors as shall be directed and approved by the commissioner" shall be erected, or by alleging that he had no personal knowledge that the fire-escapes were not erected as required by law.

APPEAL by the defendant William W. Armfield from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 6th day of March, 1890, and also from an order, entered in said clerk's office on the 15th day of March, 1890, denying the motion of the defendant to set aside the verdict and for a new trial.

The action was brought to trial before the court and a jury at the Kings County Circuit on the 5th day of March, 1890, and a verdict was rendered in favor of the plaintiff for the sum of \$2,000.

The action was brought against the owner of a building in the city of Brooklyn, which was four stories in height and was built to be occupied as a factory, and was, in fact, occupied as a factory, in which the plaintiff was employed, and which, it was alleged, the defendant, the owner, had wholly neglected to provide with any fire-escapes, or to have any ladder or stairway built to the scuttle or place of egress in the roof.

The complaint alleged that fire broke out in the building; that the plaintiff's means of escape down the stairs of the building were cut off by smoke and fire, and she was compelled to jump from one of the rear windows to the roof of a small wooden structure in the rear of the manufacturing building, a distance of about thirty feet, and was severely and permanently injured, and demanded damages to the amount of \$25,000.

John H. V. Arnold, for the appellant.

Andrew L. Gardiner and *Frederic A. Ward*, for the respondent.

PRATT, J :

The appellant, for five years before the accident, had owned and collected rent from the defective buildings. If, under those circumstances, he can avoid responsibility by alleging he had no personal knowledge that the fire-escapes were not erected as required by law, the statute would be a snare and not a safeguard.

The appellant argues that, as the statute does not in express terms declare that fire-escapes shall be erected by the owner, the duty cannot be placed upon him by a judicial construction of the law.

The law enacts that any building occupied, or built to be occupied,

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as a manufactory shall be provided with such fire-escapes as shall be directed by the commissioner. We think the initial duty rests upon the owner, that he should bring the subject before the commissioner and seek his direction.

The statute is intended to protect human life; its intentions are easily discovered, and no reason is perceived why the court should strain after so strict a construction of its language as to deprive it of all useful operation.

The appellant argues that, had plaintiff not given way to fright, and exercised a sound discretion as to the method of escape adopted, she might have found a safe egress by another window.

All those considerations were properly submitted to the jury. Their finding was adverse to defendant, and was sustained by the testimony.

It follows that the judgment should be affirmed, with costs.

BARNARD, P. J., concurred.

Judgment affirmed, with costs.

IN THE MATTER OF THE APPRAISEMENT OF CERTAIN LEGACIES,
AND THE ASSESSMENTS OF COLLATERAL INHERITANCE TAXES
THEREON, UNDER THE LAST WILL AND TESTAMENT, AND THE
CODICIL THERETO, OF JOHN GUY VASSAR, DECEASED.

Collateral inheritance tax — exemption therefrom — the legatee must be absolutely and unqualifiedly exempt from general taxation.

Vassar College was authorized, by chapter 2 of the Laws of 1861, to take, by gift or devise, real and personal estate, the annual income of which should not exceed \$40,000, and, by chapter 39 of the Laws of 1862, the real and personal estate held by the college, to the extent that it was authorized to take the same by the act of 1861, was exempt from taxation.

Under the will of John Guy Vassar a bequest was given to the college.

Held, that such bequest was subject to the collateral inheritance tax provided for by chapter 483 of the Laws of 1885, as amended by chapter 713 of the Laws of 1887. (BARNARD, P. J., dissenting.)

That, in order to exempt a legatee from the collateral inheritance tax, under the last-mentioned statute, there must be an entire freedom from general taxation.

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That as Vassar College, under chapter 39 of the Laws of 1862, was only exempt from general taxation upon the property which it was authorized to take and hold under the law of 1861, that it did not come within the provision of the collateral inheritance tax laws relating to the exemption of certain legatees from the operation of those laws.

APPEAL by Vassar College from an order or decision made by the surrogate of Dutchess county on the 1st day of July, 1890, purporting to affirm the order of said surrogate, made May 13, 1890, which order of May 13, 1890, held and decided that the said college was liable to a collateral inheritance tax of five per cent on the legacy given to it under the will of John Guy Vassar, deceased.

Also an appeal by Vassar Brothers' Hospital from the aforesaid orders of July 1, 1890, and May 13, 1890, assessing a tax upon the legacies bequeathed to Vassar Brothers' Hospital.

Also an appeal by Vassar Brothers' Home for Aged Men, in the city of Poughkeepsie, from the said orders of July 1, 1890, and May 13, 1890, assessing a tax upon the legacies bequeathed to Vassar Brothers' Home for Aged Men in the city of Poughkeepsie.

Frank Hasbrouck, for the executors of John Guy Vassar, deceased.

Cyrus Swan and *Robert E. Taylor*, for Vassar College, appellant.

Allison Butts, for Vassar Brothers' Hospital, appellant.

John P. H. Tallman, for Vassar Brothers' Home for Aged Men, appellant.

Charles F. Tabor, attorney-general, for the People, respondent.

Wilkinson & Cossum, for the county treasurer of Dutchess county, respondent.

DYKMAN, J.:

This is an appeal from a portion of the order of the surrogate of Dutchess county assessing a tax upon the legacies bequeathed to Vassar College, Vassar Brothers' Hospital and the Vassar Brothers' Home for Aged Men by the last will and testament of John Guy Vassar, deceased.

The legacy, under the same will, to the John Guy Vassar Orphan Asylum was exempted from taxation by the surrogate, and there is no appeal from that portion of the order.

All property which now passes by will, or by the intestate laws of this State, from any person who died seized or possessed of the same while a resident of this State, to any person or persons, or to any body politic or corporate other than to or for the use of the societies, corporations and institutions now exempted by law from taxation, is subject to a tax of five dollars on every hundred dollars of the value of such property. Such are the provisions of section 1 of chapter 713 of the Laws of 1887, amending chapter 483 of the Laws of 1885.

The statute under consideration is new, but, so far as it has received judicial construction, the tendency has been to hold that the societies, corporations and institutions, exempted from the operation of the act to tax gifts, legacies and collateral inheritances, are those bodies only which enjoy complete immunity from taxation as to all their property.

There must be an entire freedom from general taxation to entitle such institutions to exemption from taxation under this statute, and as none of the appellants are entirely exempt it follows that they are not within the exception to the general operation of the act. Partial relief from taxation is insufficient.

Our conclusion is, that the legacies are subject to the operation of the statute, and the order appealed from should be affirmed, with costs, to be paid from the estate, to the respondent.

PRATT, J., concurred.

BARNARD, P. J. (dissenting):

Vassar College by its charter was authorized to take real and personal estate by gift or devise, the annual income of which should not exceed \$40,000. (Laws of 1861, chap. 2.) By chapter 39 Laws of 1862, the real and personal estate to the extent it is authorized to hold the same was exempted from taxation. This is not a limited exemption. The college can take the bequest and be within the limit it is authorized to take, and then the exemption is general as to this bequest. The record shows that as to these proceedings the

college can take the bequest and still have only an income under \$40,000 annually. As to the hospital the evidence shows that to be exempt from the collateral tax. It has a lot and buildings where the sick are cared for. The land so occupied and all its personal property is exempted from taxation by chapter 298, Laws of 1882. The gift under this will is wholly of personal property. The exemption as to personal property is absolute, and it is not the less absolute in respect thereto because it might hold land subject to taxation because it was not used for the purpose of a hospital.

The "Home for Aged Men" is also exempt. It is an alms-house. The mere fact that it charges a sum to a portion of those who feed at its table and enjoy the shelter of its roof does not destroy its character as a pure public charity. (*Northampton Company v. Lafayette College*, 46 Leg. Intel., 423; *City of Philadelphia v. Pennsylvania Hospital*, 47 Leg. Intel., Feb. 14, 1890, page 70; *Temple Grove Seminary v. Cramer*, 98 N. Y., 121.)

All of its property is used in the lines of the charitable purpose of its incorporation, and the ultimate test of its character must be the result of its work as a whole. (*People ex rel. Female Academy, etc. v. Commissioners of Taxes*, 64 N. Y., 656; *People ex rel. Seminary, etc., v. Assessors*, 42 Hun, 27; *Betts v. Betts*, 4 Abb. N. C., 317.)

The order should, therefore, be reversed, with costs.

Decree of surrogate affirmed, with costs out of estate.

CHARLES WHITE, AN INFANT, ETC., BY FRANK WHITE,
HIS GUARDIAN AD LITEM, APPELLANT, v. WITTEMAN
LITHOGRAPHIC COMPANY, RESPONDENT.

Employment of a boy under thirteen years of age — not alone and of itself evidence of negligence.

Evidence simply of the employment of a boy under thirteen years of age, in violation of the statute, does not, alone and of itself, establish negligence upon the part of his employer. The violation of the statute is evidence only upon the question of negligence, but to establish it other evidence of negligence and freedom from contributory negligence must be given.

APPEAL by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 2d day of November, 1889; and also from an order denying plaintiff's motion for a new trial upon the minutes, entered in said office on the 30th day of November, 1889.

The action was tried at the Kings County Circuit before the court and a jury, at which a verdict was rendered in favor of the defendant. The action was brought to recover damages for injuries sustained by the infant plaintiff while in the employment of the defendant, a corporation engaged in the business of lithographing, printing and bronzing.

James C. Church, for the appellant.

L. C. Raegenor, for the respondent.

BARNARD, P. J. :

The complaint alleges that the defendant employed the plaintiff, who was at the time under thirteen years of age, and that he was placed at work on a dangerous machine without sufficient instructions as to its management. That by reason of the plaintiff's ignorance of the machine he was injured. The proof as to the age of the boy is conflicting. He said when he was employed that he was fourteen years old. The defendant's agent asked the boy for his father and mother upon this question of age. The plaintiff gave excuses why they could not come, and the defendant hired the boy upon his own assurance as to his age. The case went to the jury upon the question whether or not the plaintiff was sufficiently instructed as to the management of the machine and as to its dangerous character if not properly attended to. The jury found for the defendant. There was no negligence, therefore, proven, except that involved in the employment of the boy, who was under the age of thirteen years, contrary to statute. The question was not distinctly raised at the trial. The judge instructed the jury that a boy under fourteen years of age, there being a statute against employments under thirteen, could not avail himself of the fact against the defendant "where the boy had sought the employment."

The judge refused to charge that it was immaterial whether the factory act was violated or not. An employment of a boy under

thirteen did not, of itself, give a right of action for an injury sustained in the service. The boy was competent. Was fully instructed and may have been careless, for this follows the verdict. The only possible question, therefore, is whether negligence is made out by the mere hiring of a child under the statute age? The general purport that the employment of a minor upon dangerous machinery, is not, of itself, proof of negligence, is abundantly decided. (*De Graff v. N. Y. C. and H. R. R. Co.*, 76 N. Y., 125; *Hickey v. Taaffe*, 99 id., 204, and cases cited.) The principle of the decision is that the minor takes the risk of the employment like an adult, only qualified by the fact that his judgment and care in the business shall be such only as are called for by a minor. (*Stone v. Dry Dock, etc., R. R. Co.*, 115 N. Y., 104.)

There have also been decisions that when an employment has been entered into with a minor, that proof of negligence on the part of the master, and freedom from negligence on the part of the minor, shall be proven to entitle a plaintiff to judgment. A violation of a statute has been held to be insufficient of itself to establish negligence. The case of *Brown v. Buffalo and S. L. Railroad* (22 N. Y., 191) held that proof of an ordinance regulating speed was inadmissible as evidence upon the question of negligence of the company in maintaining a greater rate of speed than was permitted by the ordinance. (*McGrath v. N. Y. C. and H. R. R. Co.*, 63 N. Y., 522; *Massoth v. Delaware and Hudson Canal Co.*, 64 id., 524.)

The case under consideration is not like *Willy v. Mulledy* (78 N. Y., 310). There a breach of duty, causing damage, was held to be actionable. The breach of duty in this case did not occasion the injury of itself. The violation of the statute was evidence only upon the question, but other negligence and freedom from contributory negligence must be proven.

The question is not free from doubt. The statute was designed to protect children from dangers before the maturity of judgment assumed from a certain age was acquired. The decision, however, held that a minor assumes the risk of the employment. The statute does not say that a mere employment of a child under thirteen and an accident afterwards, shall support an action. The question whether a violation of law as to rate of speed is proof of negligence,

when the accident is caused by the rate of speed, is somewhat unsettled, but the weight of authority is that the ordinance is only evidence upon the subject.

The judgment should, therefore, be affirmed, with costs.

DYKMAN, J., concurred.

Judgment and order denying new trial affirmed, with costs.

THOMAS TAYLOR, RESPONDENT, v. THE VILLAGE OF
MOUNT VERNON, APPELLANT.

Municipal corporation — liability of, for an injury to one falling into an excavation near the sidewalk.

In an action brought against a municipal corporation to recover damages arising from an injury to the plaintiff, alleged to have resulted from the negligence of the defendant, it appeared that the plaintiff stepped from a sidewalk in a village street into an excavation and was injured; that the excavation was four feet inside of the stoop line of the house on the street, and did not encroach on the sidewalk, and that the sidewalk had a flag-walk, the inside of which was eight feet from the excavation.

No notice of this condition of things, to the village or its officers, was proved, except to a police officer on the day preceding the accident, and he at once notified the owner to guard the excavation.

Held, that the facts in this case did not establish any negligence on the part of the municipal corporation, or justified a recovery against it.

APPEAL by the defendant, the Village of Mount Vernon, from a judgment of the Supreme Court, in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 31st day of March, 1890.

The action was tried before a referee, who filed his report, upon which judgment was entered adjudging that the plaintiff, Thomas Taylor, recover of the defendant, the Village of Mount Vernon, the sum of \$2,593, together with costs.

The action was brought to recover damages alleged to have resulted to the plaintiff by reason of his having fallen into an excavation near a sidewalk in the defendant's village.

Joseph S. Wood, for the appellant.

Eugene Archer, for the respondent.

BARNARD, P. J. :

An owner of lands in the village of Mount Vernon had excavated a cellar thereon flush with the street. There were no lights and no guard-rail placed at the excavation to indicate the danger of leaving the sidewalk. The lots were naturally on the grade of the sidewalk. The plaintiff on the 15th of October, 1887, stepped from the sidewalk into the excavation and was injured. The excavation was four feet inside of the stoop line of the house on the street. The sidewalk had a flag-walk, the inside of which was eight feet from the excavation. The excavation did not encroach on the sidewalk and had not caved in so as to diminish the sidewalk. The plaintiff intentionally left the sidewalk for his own purpose and thus stepped into the excavation. The sidewalk itself was not out of repair. Under this state of facts the village owed no duty in respect to the excavation. It had been recently made as a cellar for a new building. It was entirely off the street. No notice is proven to any of the city officers. The only notice shown was to a police officer on the day preceding the accident, and he at once notified the owner to guard his excavation; whether he was liable for neglect, under the case of *Beck v. Carter* (68 N. Y., 283), is doubtful. The facts of that case show an invitation to use the place excavated as a highway by the owner and the case seems to have been decided on that ground against the owner. The place excavated was not an exposed place under *Hubbell v. The City of Yonkers* (104 N. Y., 434).

It is immaterial whether the excavation was made below the sidewalk and entirely on the owner's land or whether the danger be caused by the building of the road by a steep embankment. Where commissioners failed to erect a fence along a bank sufficient to prevent persons using the highway from walking down the declivity, the Court of Appeals say, "we are of the opinion that the town owed no duty to the traveling public to erect such fence and that it was not negligence on its part, or that of its highway commissioners, to omit to do so." (*Monk v. Town of New Utrecht*, 104 N. Y., 552.)

This case is not like *Jewhurst v. City of Syracuse* (108 N. Y., 303), where there was no visible boundary of the street and the accident happened upon a part of an owner's land used as a street. The plaintiff did not in this case suppose he was using the street, but was departing

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from it. In *Ivory v. The Town of Deerpark* (116 N. Y., 476), the highway had been cut away by a railroad and the exposed place was not guarded. The cut was at the end of a sharp curve, so that if the traveler continued in the course of the highway he must be precipitated down the bank. The facts found in the present case fail to show any negligence upon the part of the defendant.

The judgment should, therefore, be reversed and a new trial granted at circuit, costs to abide event.

DYKMAN, J., concurred.

Judgment reversed and new trial granted at circuit, costs to abide event.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
THE SOCIETY OF THE NEW YORK HOSPITAL, APPEL-
LANT v. ELIJAH PURDY AND OTHERS, ASSESSORS OF THE
TOWN OF WHITE PLAINS, RESPONDENTS.

Exemption from taxation — the New York Hospital.

The New York Hospital was exempted, by chapter 466 of the Laws of 1875, from taxation upon its real and personal property in the city of New York, if no income was derived from it, and if the same was used exclusively for the purposes for which the hospital was created. This exemption was extended, under the provisions of chapter 462 of the Laws of 1889, to property of the hospital "wherever situated." The hospital had a farm in Westchester county, the products of which were used for the purposes of the hospital, except some insignificant quantities thereof, which were sold and the proceeds applied to the support of the inmates.

Held, that the farm was exempt from taxation, and that the sale of the few insignificant products thereof was not to be deemed a source of income.

That the hospital did not lose its right to exemption because it charged certain of the inmates who were able to pay.

APPEAL by the Society of the New York Hospital from an order dismissing a writ of *certiorari*, entered in the office of the clerk of the county of Westchester on the 13th day of August, 1890.

The writ of *certiorari* was issued to the Board of Assessors of the Town of White Plains to review their action and proceedings in the assessment of certain real estate of the relator in the town and village of White Plains upon the assessment-rolls for the year 1889.

Martin J. Keogh, for the appellant.

L. W. & W. P. Platt, for the respondents.

BARNARD, P. J. :

By chapter 466, Laws of 1875, the real and personal property of the relator in the city and county of New York was made exempt from taxation if no income was derived from it, and if the same was used exclusively for the purpose for which the relator was chartered.

By chapter 462, Laws of 1889, this exemption was extended to property "wherever situated," but under the same terms and conditions. The hospital has a farm of land in Westchester county exclusively used for the charter purposes of the society. The farm is not self-supporting, and food is sent from New York for the use of the patients beyond the products of the farm, and the farm supplies the New York Hospital with vegetables. There are occasionally sales made of certain insignificant articles of produce, such as cabbage, pigs and male calves, the proceeds from which have been applied to the support of the inmates of the hospital buildings on the farm. The sole question is whether this is income within the meaning of the statute. The exemption as to money corporations, depending on "profits or income," was held not to apply where there were receipts, although the receipts were less than the expenses. (*People v. Supervisors of Niagara County*, 4 Hill, 20.) The words "profit or income" are said by the court to be frequently used synonymously, but "net income profits" and "clear income" are also used in the statute. The court decided the case, however, on what was deemed a legislative intent in the use of the words "profit or income." A later section of the act was deemed to exclude "net profit" or "clear income" as inapplicable to the case. The case of the *People ex rel. Commercial Insurance Company v. Supervisor of New York* (18 Wend., 605) held that, as to moneyed and manufacturing corporations deriving an income on their capital, the exemption classed under the words "profits or incomes" included any incomes, though less than the expenses. The present case is very different. The hospital is not a stock company, but a charitable one. The buildings in the city of New York are exempted by law from taxation, and by this amendment the exemption is extended to lands elsewhere. The farm is used solely for the purposes of the charity. The

cost of raising the produce exceeds the value of the product, and it is almost entirely used in the institution of the hospital. The case is very analogous to *Betts v. Betts* (4 Abb. N. C., 317), where it was held that the sale of a few simple articles manufactured by the blind inmates of an institution for the blind was not to be deemed a source of income. The evidence in this case shows that all the proceeds of the farm go to the support of the relator's patients, and this result determines the character of the income, received from the farm, as a whole, and not from a few sales of property which could not be advantageously used by relator. If the hospital had permitted this property to be wasted, no exemption would be waived or forfeited. (*Temple Grove Seminary v. Cramer*, 98 N. Y., 121.)

The hospital does not waive its exemption because it charges some people who are able to pay. Whether this fact makes the hospital other than a public charity, and thus subjects its buildings in New York, and the farm as well, to taxation, is fully discussed and decided in *City of Philadelphia v. Pennsylvania Hospital* (47 Legal Intel., 70, Feb. 14, 1890). The case shows that all its income from property and donations is used for the purpose of the charity, and the money received from pay patients is wholly applied to the support and attendance on those who cannot pay. The hospital is at present quite heavily in debt and has to meet the wants of many thousands of applicants every year. There is a large excess of disbursements over receipts for board of patients in 1888, amounting to \$128,994.50.

The order should, therefore, be reversed, and judgment given that the farm is exempt from taxation, with ten dollars costs and disbursements on appeal.

DYKMAN, J., concurred.

Judgment reversed and order made that the Westchester farm is exempt from taxation, with ten dollars costs and disbursements of appeal.

ALTHA M. WELLS, AS ADMINISTRATOR, ETC., OF JAMES WELLS, DECEASED, APPELLANT, v. THE BROOKLYN CITY RAILROAD COMPANY, RESPONDENT.

Horse railroad — injury to one crossing its tracks — contributory negligence.

A man sixty-one years of age started to cross a street after looking both ways, and while a horse car was fifty feet away. He crossed the first and second tracks of the horse railroad company, and got partly across the third track when he was struck by the horses attached to the car, was thrown under the wheels of the car and was fatally injured. The car was going faster than usual, and although the man was in full view of the driver its speed was not slackened.

Held, that the question of contributory negligence on the part of the deceased should have been submitted to the jury.

APPEAL by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 11th day of January, 1890, in favor of the defendant, dismissing the plaintiff's complaint after a trial before the court and a jury at the Kings County Circuit.

The action was brought to recover damages resulting from the death of the plaintiff's husband, who was run into by one of the defendant's horse cars, was knocked down and received injuries which resulted in his death.

Payne, McGuire & Low, for the appellant.

Morris & Whitehouse, for the respondent.

BARNARD, P. J. :

There was sufficient evidence produced upon the part of the plaintiff to go to the jury. The accident happened on the 27th of November, 1888, between six and seven o'clock in the evening. The plaintiff was sixty-one years of age and attempted to pass over Flushing avenue in front of the defendant's street car and was killed. When he started from the corner of Throop and Flushing avenues, and when he started to cross, he was observed to look both ways and start after this observation. The car was then fifty feet away. The deceased got across the first and second track and partly across the third track when he was struck by the car horses and thrown under the wheels of the car and fatally injured, although the car did not

pass over him. The negligence of the defendant consists in this: The car was going faster than usual and did not slack up its speed until the man was struck, although in full view of the driver of the car. The witness Schnidler thought he would have time to cross safely with the high rate of speed which continued until the accident, when the driver put on brakes to stop the car. The driver did not see the deceased until he got within twelve feet of him and the horses were within six feet of him. It was then too late to save the man who was crossing, as it takes eight feet to stop the car. The deceased was a little deaf. The driver was bound to be watchful, especially in a crowded city, so as not to injure persons crossing the street. (*Moebus v. Herrmann*, 108 N. Y., 349.) It does not appear that he did so, if he could see fifty feet ahead of him, and did see a man crossing the street, and kept up a rapid rate of speed until the horses were within six feet of the person crossing, and when the accident could not be prevented. The contributory negligence of the deceased was a question for the jury. It was not negligence on his part to attempt to pass in front of a car fifty feet away, as matter of law. The neglect of the defendant being found, it will go far towards acquitting the deceased of neglect. He probably assumed that the rate of speed was less than it was, or that the driver would slightly slacken the speed. (*McClain v. Brooklyn City R. R. Co.*, 116 N. Y., 459.)

The order dismissing the complaint and the judgment thereon should be reversed and a new trial granted, costs to abide event.

PRATT, J., concurred.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.

ANNA R. HARLOW, RESPONDENT, v. ABNER MILLS,
APPELLANT.

An administrator who negotiates a sale of the real estate of his intestate, conveyed by the deed of the heirs, is liable for the money received by him therefor and deposited in a bank which fails.

An administrator of an estate, who negotiates the sale of a farm which belonged to his intestate, and which is conveyed by a deed signed by the children of the intestate, the purchase-price of which is received by the administrator, and is deposited by him in a bank which subsequently fails, is liable for the money lost through the failure of the bank.

It is the duty of the administrator, in such a case, to at once pay over the money to the parties entitled thereto, and in receiving and depositing such money he does not act within the rule that a trustee or public officer, who deposits money in a bank of good standing, without negligence on his part, will not be liable if the bank fails.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Orange on the 1st day of April, 1890, in favor of the plaintiff after a trial before a referee, with notice of an intention to bring up for review the evidence given upon the trial of the action, the rulings of the court thereupon, his findings of fact and conclusions of law.

T. A. Read, for the appellant.

William Vanamee, for the respondent.

BARNARD, P. J.:

William D. Harlow died intestate in 1874, leaving four children. The plaintiff is one of them. He left a widow, who has since died. He left a farm of land which was sold in September, 1884, for \$14,341.25. There was personal property sold to the amount of \$1,670.75. The whole of the proceeds of the real and personal estate went into the hands of the defendant at the time. He managed the sale which was perfected by a deed signed by the children of the deceased. There was no arrangement between the plaintiff and defendant under which the defendant took the money for the farm.

He was a cousin of the plaintiff and took the moneys for the children. He was administrator of the estate. Partial payments were made to plaintiff at different times.

This action is brought to recover the balance due her from the proceeds of her father's property. The personal estate was settled before the surrogate in 1880. The defendant deposited the moneys he received in the Middletown National Bank, with the exception of a small sum represented by a note given for a part of the personal property. The bank failed, and some twenty per cent of the money was lost by the defendant. The money had been in the bank about two months before the failure. When the defendant received the money it was his duty to pay it over at once, and for that purpose to seek his creditor. (*Mills v. Mills*, 115 N. Y., 80.)

The deposit of the money for two months was wholly without authority, and the defendant cannot throw the loss occasioned thereby upon the plaintiff, who did not assent to the same. There is nothing in the proof which will justify an inference that the plaintiff assented to defendant's custody of the money. He claimed to keep it as administrator, and the plaintiff was not informed that he could not keep it as administrator until quite recently, and some years after he was discharged as administrator of the personal estate. The case thus shows a detention of money without authority, and within the line of cases which hold defendant's obligation to require immediate payment over. A loss by the failure of the bank in such a case falls upon the debtor. There are cases which hold a trustee or public officer who deposited money in a bank of good standing, and without negligence on his part, will not be liable if the bank fails. (*People ex rel. Nash v. Faulkner, Exr.*, 107 N. Y., 477.)

The facts found do not bring this case under the principle governing the liability of trustees or public officers. The complaint is one upon contract. The words averring a wrongful holding and a wrongful conversion are not inconsistent with an averment of a contract, and such words may be disregarded upon the trial. (*Conaughty v. Nichols*, 42 N. Y., 83.)

Assuming a liability, there is no reason why the legal rate of interest should not be added. The case cited for a contrary rule, *King v. Talbot* (40 N. Y., 76), was as to the liability of a trustee and executor.

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The defendant is liable, if at all, like any other debtor, and it is no defense to payment that a bank in which he deposited money failed. The judgment should be affirmed, with costs.

DYKMAN, J., concurred.

Judgment affirmed, with costs.

JOHN SIMPSON, AN INFANT, ETC., RESPONDENT, v. CHARLES GRIGGS, APPELLANT.

Vicious dog — an employer is not liable for the acts of one kept by his employee on the former's land.

Griggs, a tenant in occupation of a farm, employed in working it one Wood, who was allowed to occupy a farm-house on the premises as a part of the compensation for his labor, the products of which were received by Griggs. Wood brought a dog upon the premises, which, in the course of his employment, Wood occasionally used to churn butter which was made for Griggs. The dog was vicious and bit one Simpson, who brought an action against Griggs to recover damages for the injury thus inflicted.

Held, in the absence of knowledge upon the part of Griggs of the bad disposition of the dog, that he was not liable.

The employer does not harbor a dog, because he knows that his hired man has one in his family which occupies a separate residence on the farm.

APPEAL by the defendant Charles Griggs from a judgment of the Supreme Court, entered in the Dutchess county clerk's office on the 14th day of June, 1890, in favor of the plaintiff, after a trial before the court and a jury at the Dutchess County Circuit, at which a verdict was rendered in favor of the plaintiff for the sum of \$500, and also from an order denying a motion for a new trial made upon the minutes of the court.

The action was brought to recover the damages resulting to the plaintiff from having been bitten by a vicious dog upon the premises leased and occupied by the defendant.

H. H. Hustis, for the appellant.

Schlosser & Wood, for the respondent.

BARNARD, P. J.:

The defendant and others occupied, under a lease from Mrs. Hunt, a farm in Wappingers, Dutchess county. There was a brick-yard on the farm which was operated by Griggs & Company. They employed one Wood to work the farm. Wood occupied a farmhouse on the premises, and the defendant and his partner had the proceeds of the farm. Wood occupied the house as a hired man, and the occupancy was a part of the compensation for the labor of Wood. Wood brought a dog with him when he went there, and this dog was kept by Wood at the house he occupied on the farm of Grigg's land in Newburg.

While Wood denied his ownership of the dog, it is manifest that he did own him and had absolute and sole control over him. The dog was vicious and bit the plaintiff. The defendant knew nothing of the bad disposition of the dog, other than is implied from a knowledge by Wood that the dog was savage and would bite mankind. The defendant's liability was based upon the proof that he employed Wood and Wood brought the dog with him, and that the defendant's firm had the proceeds of the farm, and that the employee Wood occasionally used the dog to churn butter which was made for the farm. The employer does not harbor a dog, because he knows that his hired man has one in his family, which occupies a separate residence. (*Auchmuty v. Ham*, 1 Denio, 495.) The defendant knew nothing of the evil qualities of the dog personally, and had no power over him.

The judgment and order denying a new trial should, therefore, be reversed, with costs to abide event.

PRATT, J., concurred; DYKMAN, J., not sitting.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
EMMET MYERS *v.* THE MASONIC GUILD AND
MUTUAL BENEFIT ASSOCIATION, APPELLANT.

Mandamus — to compel a mutual benefit association to make an assessment.

After a judgment has been recovered, upon a certificate of insurance, against a mutual benefit association which has refused to make an assessment for the purpose of paying an amount payable under the terms of the same, and an execution issued thereon has been returned unsatisfied, the association will be compelled by a *mandamus* to make an assessment for the purpose of obtaining the fund with which to pay the certificate.

APPEAL by the Masonic Guild and Mutual Benefit Association from an order of the Supreme Court, entered in the office of the clerk of the county of Orange on the 16th day of June, 1890, directing that a peremptory *mandamus* issue directed to and commanding the said Masonic Guild and Mutual Benefit Association to make and call an assessment upon all the members of its company or association, in the usual way of making such calls or assessments, and to continue calling or making the same, to an amount sufficient to equal the judgment recovered in said court on the 19th day of February, 1889, in favor of Emmet Myers and against the Masonic Guild and Mutual Benefit Association, for the sum of \$2,247.40 damages and costs.

Adolphus D. Pope, for the appellant.

John W. Lyons, for the respondent.

BARNARD, P. J.:

The defendant issued to Isaac Myers a certificate entitling the plaintiff to \$3,000 on the death of Isaac Myers. Isaac Myers died and the plaintiff brought his action to recover the amount. By the judgment of this court the plaintiff recovered a judgment for the sum of \$1,600, with interest from the 10th of August, 1884, that being the amount unpaid on the certificate. By the agreement between Isaac Myers and the company defendant, an assessment was to be made on all the members so as to pay the full sum of \$3,000 within thirty days after notice of death. This has not been done. An

execution fails to obtain property to satisfy the judgment. The case is one without remedy if the company cannot be compelled by *mandamus* to perform an act which, by the contract, was to produce the fund. The duty is clear. It is the contract. The society is a mutual one, and an assessment is the method by which the benefits of the association are attainable. There is no remedy by action; that has been tried and, except so far as it overruled the question now waged as a defense, was fruitless. It is not collecting a debt by *mandamus*. The effect of the writ is only to make a board of masters do a certain duty which they owe to the plaintiff. The plaintiff has a clear legal right and no other remedy. *Mandamus* is not the proper remedy until after judgment. (*Doty v. N. Y. State Mutual Benefit Association*, 29 N. Y. St. Rep., 896.)

The judgment should, therefore, be affirmed, with fifty dollars costs.

DYKMAN, J., concurred; PRATT, J., not sitting.

Order granting *mandamus* affirmed, with fifty dollars costs.

THE DIAMOND BRICK COMPANY, RESPONDENT, v. THE
NEW YORK CENTRAL AND HUDSON RIVER RAIL-
ROAD COMPANY, APPELLANT.

Gate in a fence inclosing a railroad company's tracks — the company is not bound to keep it shut.

Where a gate has been built, in accordance with law, by a railroad company, in the fence inclosing its tracks, for the use of the owner of the adjacent land, the railroad company is not bound, as between it and the landowner, to close the gate even though its officers have noticed that it is open.

Where the owner leaves the gate open, neither the owner nor his employees nor lessees have any right of action against the railroad company because of an injury to a horse which passes through such open gate onto the tracks of the railroad company and is injured.

APPEAL by the defendant, the New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Rockland on the 20th day of May, 1890, after a trial before the court and a jury at the Rockland County Circuit, at which a verdict was rendered in

favor of the plaintiff for the sum of seventy-five dollars; and also from an order denying the defendant's motion for a new trial made upon the minutes of the court, entered in the office of the clerk of said county on the 10th day of May, 1890.

Ashbel Green and Herbert E. Kinney, for the appellant.

George W. Weiant, for the respondent.

BARNARD, P. J. :

The West Shore Railroad runs through the farm of Emma Reed. The railroad fenced its track and left a gate for the use of the farm owners. The Diamond Brick Company, by the permission of the owner, had pastured a horse upon the Reed farm. The field in which the horse was pastured ran back to the railroad. The gate in question was a part of the fencing when it was shut. In September, 1886, the horse got upon the railroad track and was killed by an engine of defendant which operates the West Shore Railroad. The fence was a wire fence four wires high, fastened to upright posts, and was three or four feet high. There was some claim made that the fences were made without sufficient strength of wire and staple, but the claim was so entirely unaccompanied by any evidence that the horse got on the railroad track through these defects, that the judge told the jury that the evidence was insufficient to justify a finding on the ground that the fence was insufficient. Under the evidence the gate was continually kept open, at least there is evidence which justifies the jury in so finding. The only question is, therefore, whether or not, as against the land owner, the railroad company is bound to close the gate when its officers have notice that it is open. There seems to be no basis for a charge of negligence against the defendant. The gate was built for the owner, and it was built in accordance with law for the use of the owner. The railroad could not control the use of the gate. After use the owner either did not shut the gate or permitted it to remain open for long intervals of time. If this is neglect on the part of the company arising from a failure to shut the gate, why is it not neglect on the part of the owner to leave it open while using it for the purpose of the farm from day to day all summer or a great portion of the summer? She took her risk as to the cattle getting on the railroad by the open gate, and she

hired the pasturage to the plaintiff upon the same condition. It would have been unwarrantable in the defendant to shut the gate on the day of the accident if the owner was using the crossing; and a failure to inquire whether or not the gate was open by the farm employees using the same is not a negligent act. The proof, therefore, fails to show any neglect in respect to the gate in question. The owner for her own convenience left the gate open, and neither she or her employees or lessees can complain of the railroad company for not shutting it.

The judgment should be reversed and a new trial granted, costs to abide event.

DYKMAN, J., concurred.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.

LUDLOW W. VALENTINE, AN INFANT, ETC., APPELLANT, v.
SUSAN A. AUSTIN AND ELIZABETH H. LUNT, RESPOND-
ENTS, IMPLEADED, ETC.

Lis pendens — when canceled by order of the court — notice.

Where a notice of *lis pendens*, filed in the county clerk's office in a pending action, has been canceled by an order of the court, a party examining the title to real property described therein is not bound to examine the complaint in the action, or to take notice of what such an examination would disclose.

When a *lis pendens* is canceled by an order of the court it ceases to be notice to any one.

APPEAL by the plaintiff from so much of a judgment of the Supreme Court, dated May 26, 1890, as dismissed the complaint as to the defendants Austin and Lunt, or either of them.

The action was brought to trial at Special Term, after certain issues had been submitted to the jury, and a decision or findings were rendered and filed, which followed the verdict of the jury.

The action was brought by the plaintiff, as an heir-at-law of Catherine A. Valentine, deceased, to set aside a deed of certain premises from her to the defendant Richardt; also a deed from

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Richardt to the defendant Austin, and a mortgage from Austin to the defendant Lunt.

Horace Secor, Jr., for the appellant.

James D. Bell, for the respondent Austin.

W. C. Beecher, for the respondent Lunt.

BARNARD, P. J. :

The defendant Austin is a grantee from one Herman T. Richardt, and the defendant Lunt is a mortgagee from Austin of the same premises. Richardt acquired the title to the land by fraud and undue influence from one Catharine A. Valentine. Catharine A. Valentine was sane when she made the conveyance. Both of these defendants took their conveyances in good faith and for value. This fact is found by the jury and also by the court at the request of the plaintiff. No evidence is returned, but the appeal is taken from the findings and judgment therein, so far as the same dismisses the complaint upon the merits as to the defendants Austin and Lunt. The facts found destroy the plaintiff's claim.

A purchaser, in good faith and for value, is one who takes without notice of any outstanding equity or lien not of record, or defect of title in any way. (*Simpson v. Del Hoyo*, 94 N. Y., 189.)

There is no conflict in the findings. It is found that Catharine A. Valentine, by a next friend, commenced an action to set aside the Richardt conveyance, because it was obtained from her by fraud and undue influence and without consideration. This action had been dismissed "before the plaintiff opened or offered any testimony," and judgment was entered accordingly. There was a *lis pendens* filed in this action. When the defendants Austin and Lunt took the conveyance they caused a search to be made, and the search returned the finding of the *lis pendens*, and that it was canceled by order of the court on the 6th of September, 1886.

The appellants claim that it was the duty of these defendants to examine the complaint in the Richardt action and to take notice of what such an examination would disclose. This is too stringent a rule of constructive notice. The record was clear, and while there had been a *lis pendens* which affected the title, it had been discharged by a judgment which the evidence does not question.

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They knew of no facts which should have put them upon inquiry, and in such a case the want of diligence is not want of good faith. (*Parker v. Conner*, 93 N. Y., 118.)

The finding of good faith is irreconcilable with this constructive notice, which is claimed to have been sufficient to put the parties on inquiry. The canceled *lis pendens* was not notice except in the action in which it was filed, and all who dealt with the title while it was in force would be deemed bound equally as if they were parties to the action. (*Lamont v. Cheshire*, 65 N. Y., 30.)

When the *lis pendens* was canceled by order it ceased to be notice to any one, and those who subsequently dealt with the title could rely upon the record. They were not bound to examine the complaint in an action which from the record had no basis.

The judgment should, therefore, be affirmed, with costs of appeal to each respondent.

DYKMAN, J., concurred ; PRATT, J., not sitting.

Judgment affirmed, with costs of appeal to each respondent.

IN THE MATTER OF THE ESTATE OF CHARLES H. BUTLER,
DECEASED.

Collateral inheritance tax— a child adopted under the laws of Massachusetts is not liable to.

In February, 1878, a boy about two years of age was taken by one Butler from a charitable institution under an agreement on Butler's part to adopt him as his son, and, in 1884, he was formally and legally adopted by Butler, with the consent of his wife, under the laws of the State of Massachusetts, which are substantially the same as those of the State of New York. The boy lived with Butler for eleven years, and until the latter's death. He was treated as a son, and was given by his will some \$50,000.

Held, that this sum was not chargeable with the collateral inheritance tax under section 1 of chapter 713 of the Laws of 1887, amending chapter 483 of the Laws of 1885 of the State of New York.

That, to entitle an adopted son to exemption from this tax, it was not necessary that the proceedings for adoption should have been taken under the laws of the State of New York.

APPEAL by Edward Knapp Butler from an order of the Surrogate's Court of the county of Westchester, made on the 23d day of July, 1890, which affirmed the report of an appraiser, dated March 24, 1890, so far as the same taxed a legacy, left by one Charles H. Butler to the said Edward Knapp Butler, under chapter 713 of the Laws of 1887 and chapter 483 of the Laws of 1885, and the acts amendatory thereof and supplementary thereto.

Calvin Frost, for the appellant.

William P. Platt, for the County Treasurer, respondent.

DYKMAN, J.:

Charles H. Butler died in September, 1889, leaving a last will and testament, which has been officially proved and is now in full force and operation. The will contained, among other provisions, a bequest of a legacy in these words: "To my adopted son, Edward K. Butler, five hundred shares of stock in the corporation known as Butler Brothers." It turns out now that the value of the stock so bequeathed is about \$50,000.

This adopted son was taken by the testator and his wife from a charitable institution in the city of Boston, in the month of February, 1878, when he was about two years old, with a desire and design and under an agreement with the officers of the institution to adopt him as a son and provide him a home, and the child was immediately taken into the family of the testator, where he remained down to the time of the death of the latter, a period of more than eleven and a half years, during all of which time the boy was cared for, supported and maintained solely by the testator, and treated in all respects as a son. He was always spoken of by the testator and all the members of his family as his child, and he was held out to the world as the child of the testator, and supposed himself to be such, and did not know to the contrary until after the death of the testator.

In July, 1884, the boy was formally and legally adopted by the testator, with the consent of his wife, under and in pursuance of the laws of the State of Massachusetts, which are substantially the same as our own statutes upon this subject, as we gather from the

record before us. Such are the uncontroverted facts which appeared before the surrogate of Westchester county in a proceeding to charge the legacy with a tax under the law for the taxation of gifts and legacies in this State. The legatee claimed immunity from the tax under the exemptions allowed by the statute upon which the proceedings were based, and the surrogate decided against his contention and made an order for the imposition of the tax upon his legacy, and he has appealed from the order.

The statute which is to dictate the decision of this appeal, so far as it has application to this case, is this: "After the passage of this act all property which shall pass by will or by the intestate laws of this State from any person * * * other than to or for the use of his or her father, mother, husband, wife, child, brother, sister, * * * or any child or children adopted as such in conformity with the laws of the State of New York, or any person to whom the deceased for not less than ten years prior to his or her death stood in the mutually acknowledged relation of a parent * * * shall be and is subject to a tax of five dollars on every hundred dollars of the clear market-value of such property." (Laws of 1887, chap. 713, § 1, amending chap. 483 of the Laws of 1885.)

It was the design of this statute to impose a burden upon all property which should pass by will or by the intestate laws of this State to any person or persons or body politic or corporate, other than to or for the use of certain persons, among whom are adopted children. The section is somewhat awkwardly constructed, but the intention of the legislature to exempt adopted children from the operation of the law is plainly manifested. In fact, there is no controversy upon that point in this case, but the appellant has thus far been deprived of the benefit of the exception in this statute because he was not an adopted son of the testator who gave him the legacy.

The question for our determination, therefore, is whether this appellant stands within the class of persons who are relieved from the burdens imposed by this statute. "Any child or children adopted as such in conformity with the laws of the State of New York, or any person to whom the deceased for not less than ten years prior to his or her death stood in the mutually acknowledged relation of a parent," is within the exemption provided by the law, and this appellant was both adopted in conformity with the law of

our State, and the deceased stood for more than ten years prior to his death in the mutually acknowledged relation of a parent to this appellant.

This statute does not require the proceedings for adoption to be under the laws of this State or within this State, but to be in conformity with them, to be like them and to correspond in character and manner with them, wherever they are conducted; and an examination of the proceedings in Boston for the adoption of this child shows that they conform substantially to the requirements of our statute. There is no reason for a severe construction of this statute. This boy was legally adopted under laws substantially similar to our own, so far as the mode of procedure is concerned, and that is sufficient to answer the requirements of this law. Moreover, the deceased stood in the mutually acknowledged relation of a parent to this appellant for eleven years and a half prior to his death. No evidence of adoption is required by this portion of the statute, but mutual acknowledgment, and that is proven in this case by all the facts and circumstances which cluster round these parties from the commencement of their relation to the death of the testator.

The appellant, from his earliest recollection, believed the testator to be his father, recognized him as such and knew no other, and the testator took him to his home as a child and treated him in all respects as a son. Their relations were parental and their entire conduct was a mutual acknowledgment of their relation. The child was taken in helpless infancy with no expectation of compensation or services. He was treated as a son and was obedient to his foster father and dependent upon him, and the statute requires no higher proof of mutual acknowledgment. The word mutual in this statute has no abstruse signification. It means and requires reciprocity of action, correlation and interdependence, and finds its best illustration and application in the relations existing between parents and children, which are always mutual. This construction of the statute was adopted in the *Matter of Spencer's Estate* (4 N. Y. Supp., 395), in a very able and exhaustive opinion by Mr. KENNEDY, Surrogate of Madison county. Our common experience teaches us that children at three years of age recognize their parents and are able to designate them by words and actions, and we find no difficulty in concluding from the record before us that the appellant recognized the testator

as his father, and that the testator recognized him as his adopted son for more than ten years before the death of the testator ; and the mutuality of the recognition of such relations between them was abundantly established.

Our conclusion, therefore, is that the order appealed from is erroneous and should be reversed, with costs to be paid from the estate by the executors.

BARNARD, P. J., and PRATT, J., concurred.

Order of surrogate reversed, with costs to appellant out of estate.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. EMMA FISHBOUGH, APPELLANT.

Game law — chap. 534 of 1879, chap. 584 of 1880 — forbids the sale of live as well as of dead birds.

Under section 12 of chapter 584 of the Laws of 1879, as amended by chapter 584 of the Laws of 1880, providing that " no person shall at any time, in this State, kill or expose for sale, or have in possession after the same is killed, any eagle, woodpecker, night-hawk, yellow bird, wren, martin, oriole or any song bird, under a penalty of five dollars for each bird so killed, exposed for sale or had in possession," a person who exposes for sale any of the birds mentioned in said act is liable to the penalty imposed thereby.

The act is to receive the same construction as if it had read: " No person shall expose for sale any eagle," etc.

The said statute was not repealed by section 1 of chapter 427 of the Laws of 1886. Repeals of statute by implication are not favored in law, and the earlier statute will remain undisturbed unless the language of the latter act indicates an intention to abrogate the former, or to prescribe the only rule which shall govern the case for which provision is made, or unless the two statutes are incompatible or repugnant.

APPEAL by the defendant Emma Fishbough from an order of the Supreme Court, entered in the office of the clerk of the county of Richmond on the 28th day of May, 1890, in favor of the plaintiff, after a trial at the Richmond Circuit, at which the court found, upon an agreed statement of facts, that the plaintiff was entitled to judgment for the sum of eighty-five dollars, besides costs.

Josiah T. Marean, for the appellant.

Thomas W. Fitzgerald, for the respondent.

DYKMAN, J.:

This was an action for the recovery of a penalty under the following statute: "No person shall at any time, in this State, kill or expose for sale, or have in possession after the same is killed, any eagle, woodpecker, night-hawk, yellow bird, wren, martin, oriole or any song bird under a penalty of five dollars for each bird so killed, exposed for sale or had in possession." (Laws of 1879, chap. 534, § 12, as amended by chap. 584, Laws of 1880.)

The action was tried before a judge without a jury, and he found, upon facts made and stipulated by the parties, that the defendant had in her possession for sale seventeen live yellow birds on the 18th day of May, 1889, at the city of Brooklyn, and thereupon decided that the plaintiff was entitled to judgment against the defendant for eighty-five dollars, besides the costs of the action.

The defendant has appealed from the judgment entered upon such decision, and her contention is that the statute received an improper construction and application at the circuit, her insistence being that the words "expose for sale," as well as the words "have in possession," are qualified and limited by the words "after the same is killed."

The statute, like many others, is obscure, and its intent is uncertain. Whether the exposure for sale, as well as the possession, relates to dead birds, or whether the exposure for sale has relation to birds which are alive as well as such as are dead, is by no means clear.

When this law was made it had become customary and fashionable to ornament the bonnets of ladies with birds of gay and gaudy plumage, and the great demand thus created led to the procurement of such birds in quantities which threatened their extinction. The eagles and the song birds had also become scarce, and were rapidly diminishing in numbers, and it was the design of the legislature in the enactment of this law to preserve all such birds. Such being the evil at which this statute was aimed, it should be allowed full scope and operation, and receive a construction which will secure the execution of the intention of the legislature.

One mode of obtaining birds for ornamentation seems to have been to capture them alive and sell them to dealers, who can then supply the trade as the birds are required; and if that can be done with impunity without falling under the condemnation of the law, then the statute fails to prevent the capture of live birds or their sale, and so fails to prohibit one method of their destruction. We think the statute should receive a broader construction, and one which will condemn the exposure for sale of any of the birds covered by the language of the law, the same as if it had read "no person shall expose for sale any eagle," etc.

We do not think section 1 of chapter 427 of the Laws of 1886 repeals the statute under consideration. That section interdicts the exposure for sale of the enumerated birds after they have been killed, whereas, according to our understanding, this statute inhibits the exposure for sale of live birds.

Repeals of statutes by implication are not favored in law, and the earlier statute will remain undisturbed, unless the language of the later act indicates an intention to abrogate the former or to prescribe the only rule which should govern the case for which provision is made or the two statutes are incompatible or repugnant. It is only where the later of two statutes relating to the same subject is intended to prescribe the only rule which shall govern, that it repeals the earlier by implication, though they are not in terms repugnant or inconsistent. (*Matter of N. Y. Institution*, 121 N. Y., 234.) As these two statutes are compatible and harmonious, and may both be executed and carried into effect, we do not think the former is abrogated.

The judgment should, therefore, be affirmed, with costs.

PRATT, J., concurred; BARNARD, P. J., not sitting.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ABRAM J. MILLER, RESPONDENT, v. HILLYER RYDER, AS
COUNTY TREASURER OF THE COUNTY OF PUTNAM, APPELLANT.

Distribution of unclaimed proceeds of sale in partition suits—Code of Civil Procedure, secs. 1582, 841—chapters 89 and 40 of 1889 are constitutional.

Sections 1582 and 841 of the Code of Civil Procedure, as amended, respectively, by chapters 89 and 40 of the Laws of 1889, relating to the distribution of unclaimed moneys arising from the proceeds of sale of real property in actions of partition in certain cases, are not in violation of the constitutional provision which prohibits the deprivation of persons of their property without due process of law. They simply establish a new rule of evidence, the creation of which is within the authority of the legislature.

Semble, that if these laws made the lapse of time conclusive evidence of the death of the unknown heirs, and precluded them from establishing the truth of their existence, the laws could not be upheld as a legitimate exercise of legislative power because they might destroy rights and work a confiscation of property; that as they simply shifted the burden of proof in the proceedings to obtain a fund in the hands of the county treasurer, they operate upon the remedy merely, and not upon a vested right.

APPEAL by the defendant Hillyer Ryder, as county treasurer of the county of Putnam, from an order made at the Dutchess County Special Term, August 16, 1890, and entered in the office of the clerk of the county of Putnam on the 19th day of August, 1890, directing that a writ of *mandamus* issue to said county treasurer requiring him to pay to Esther Jane Griffen and others, in the proportions therein named, certain moneys in the custody of the said treasurer.

Clayton Ryder, for the appellant.

Abram J. Miller, relator in person, respondent.

DYKMAN, J.:

This is an appeal from an order directing the issuance of a peremptory writ of *mandamus* to the defendant, requiring him to pay over to certain persons money brought into court over twenty-five years since for unknown owners, in an action for the partition of land.

The facts upon which the proceeding is based are substantially as follows: Louis B. Griffen died intestate, seized and possessed of a farm of land in Putnam county, and an action was commenced in the Supreme Court for the partition of the land, which resulted in a judgment for the sale of the premises, and the share of the descendants of Deborah Ann McCormick, a deceased sister of Louis B. Griffin, who died twenty years before him, being one-fifth of the net proceeds of the sale, was brought into court and deposited with the county treasurer of Putnam county December 19, 1863, where it has since remained, accumulating interest.

The relator and other parties in interest presented to the Supreme Court at Special Term, on the 8th day of February, 1890, a petition setting forth the above facts, and alleged that more than twenty-five years had elapsed since the payment of the money into court; that no claim had been made therefor by any person entitled thereto, and that due inquiry for the unknown heirs of Deborah Ann McCormick had been made; and upon such petition and the subsequent proceeding thereon, the court, on the 19th day of July, 1890, made a decree in the action of partition, declaring that the unclaimed portion of the proceeds of the sale, with all accumulations of interest, was vested at the time of such payment in the then known heirs of Deborah Ann McCormick, deceased, and directing the county treasurer of Putnam county to pay over said sum, now amounting to about \$18,000, to the known heirs and the persons claiming under or through them, as set forth in such decree.

The defendant refused to make such payment, on the ground that the decree was without other authority of law than that conferred by sections 1582 and 841 of the Code of Civil Procedure, as amended by chapters 39 and 40 of the Laws of 1889, and that such chapters were unconstitutional and void.

On the 16th day of August, 1890, an order was made at the Special Term, on notice to the defendant, that a peremptory writ of *mandamus* issue out of the court, directed to the defendant, requiring him to make such payment, and from that order the defendant has appealed to the General Term.

Chapter 39 of the Laws of 1889 is entitled "An act to amend section 1582 of the Code of Civil Procedure, relative to the distribution of unclaimed moneys arising from the proceeds of sales of

real property in actions of partition in certain cases." It is as follows:

"Where a person has been made a defendant as an unknown person, or where the name of a defendant is unknown, or where the summons has been served upon a defendant without the State, or by publication, and he has not appeared in the action, the court must direct his portion to be invested in permanent securities at interest for his benefit until claimed by him or his legal representatives, but after the lapse of twenty-five years from the time of the payment into court, or to the treasurer of any county, of any portion of the proceeds of the sale of real property for unknown heirs, in any action of partition without any claim therefor having been made by a person entitled thereto, and upon there being made and presented to the court, at a Special Term thereof, proof by petition or otherwise, showing to the satisfaction of the court that due inquiry for such unknown heirs has been made, and that no claim has been made for such portion of said proceeds by any person entitled thereto, the said court shall have power to decree that such unclaimed portion of such proceeds was vested at the time of such payment in the known heirs of the common ancestor of such unknown heirs, and their heirs and assigns, and shall make an order in such action directing the payment to them or their assigns of the respective shares or portions of, or interest in such proceeds, to which they are entitled; and upon serving on the county treasurer a certified copy of such order the treasurer shall so pay over and distribute the same after deducting his lawful commissions, and shall thereupon be exempt from all liability on account thereof."

Chapter 40 of the Laws of 1889 is entitled "An act to amend section 841 of the Code of Civil Procedure relative to the presumption of the death of unknown heirs, in actions of partition, in certain cases," and is as follows. "A person upon whose life an estate in real property depends, who remains without the United States, or absents himself, in the State or elsewhere, for seven years together is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time. And where, in any action of partition in this State, any portion of the

proceeds of the sale of real property is, or has been, paid into court, or paid to the treasurer of any county for any unknown heirs, and is unclaimed for twenty-five years, the lapse of twenty-five years after such payment, raises the presumption of the death of such unknown heirs, and they are and shall be presumed to be dead, in any action or proceeding for the purpose of distributing and paying over such proceeds."

So far as these statutes have application to the present proceeding, their provisions are substantially similar and they are to be construed together. It is the claim of the defendant, however, that they are violative of the constitutional prohibition which inhibits the deprivation of persons of their property without due process of law. In our view, however, they simply establish a new rule of evidence, which the legislature often does, and which is fully within the legislative authority. The competency of the legislature to make new rules of evidence or change the common-law rules existing, unrestricted by the provisions in the Constitution, which interdict the appropriation of private property without due process of law, has been frequently considered by the courts and is now firmly established. (*People v. Turner*, 117 N. Y., 233; *Hand v. Ballou*, 12 id., 541.)

So the legislature may enact laws affecting civil rights and allow them retroactive operation, while laws relating to crimes and their punishment may not be made to retroact; the interdiction of the Constitution of the United States and of this State applies only to criminal law. In our State, all legislative power is vested in the legislature, which, within its sphere, possesses the omnipotence ascribed to the British Parliament, except where its exercise is restricted by the Constitution. (*Dash v. Van Kleeck*, 7 Johns., 477; *People v. Turner*, *supra*; *Mongeon v. People*, 55 N. Y., 613; *People ex rel. Collins v. Spicer*, 99 id., 233.)

Returning again to the statutes in question, we think they must be understood as affecting the remedy by which civil rights are to be enforced and not as destroying vested interests. All rules and regulations respecting legal remedies are subject to the modification and control of the legislature, and the rules of evidence are no exception. (*Howard v. Moot*, 64 N. Y., 268.)

If these laws made the lapse of time conclusive evidence of the death of the unknown heirs, and precluded them from establishing

the truth of their existence, they could not be upheld as a legitimate exercise of legislative power, because then they might destroy vested rights and work a confiscation of property.

Legislation similar to this is by no means infrequent in this State. The Code of Practice wrought very radical changes in the proceedings in civil actions in this State, and its provisions were applied to existing causes of action where suits had not been commenced before their enactment. But they have not been held to impair or trench upon the obligations of contracts or to destroy vested rights. Familiar instances of the constitution of presumptive evidence by certain facts are the recitations in tax leases from which the regularity of certain proceedings are presumed. The possession of various weapons concealed upon the person is made presumptive evidence of carrying them with intent to use the same in violation of the statute. (Penal Code, § 411.)

Possession of a dredge in the waters of Long Island sound is made presumptive evidence of intent to use the same in violation of the provisions of the statute prohibiting such use. (Chap. 234 of the Laws of 1870, § 4.) Our conclusion, therefore, is that these statutes operate upon a remedy and not upon a vested right. They shift the burden of proof in a proceeding to obtain the fund in the hands of the county treasurer, and thus operate upon the method of procedure. They render proof of death unnecessary in the first instance, after a court is satisfied that due inquiry for such unknown heirs has been made, and that no claim has been made for such fund by any person entitled thereto. Such is our construction of these statutes, but they are new and have not passed the scrutiny of the Court of Appeals.

It is difficult to draw a dividing line between statutes which affect remedies only and those which pass beyond the limits of legislation, and impair vested rights or antecedent contracts. We, therefore, find the county treasurer justified in obtaining the opinion of the courts before he yields up the possession of the large fund in question.

The order should be affirmed, but, under the circumstances, without costs.

PRATT, J., concurred ; BARNARD, P. J., not sitting.

Order granting *mandamus* affirmed, with * costs.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. THE LONG ISLAND RAILROAD COMPANY,
APPELLANT.

*Flagman at railroad crossing — constitutionality of an order of court requiring it,
under chapter 489 of 1884.*

The provisions of chapter 489 of the Laws of 1884, authorizing the Supreme Court or a County Court to order that a flagman be stationed at a railroad crossing upon a street, highway, turnpike or plank-road, where the same is crossed at the same level by a railroad, are not unconstitutional as delegating legislative power to the judges of these courts.

APPEAL by the defendant, the Long Island Railroad Company, from a judgment of conviction of the defendant, rendered December 4, 1889, under section 154 of the Penal Code, of a misdemeanor under an indictment charging the Long Island Railroad Company with the crime of willfully omitting to perform the duty of stationing a person or persons at or near gates erected across the traveled roadways of Bridge and Water streets, in the village of Sag Harbor, in the county of Suffolk, to open or close the same when an engine or train passed or repassed between May first and November first in each year.

The indictment further alleged that on or about the 10th day of June, 1887, by order of the County Court of Suffolk county, dated on that day, the defendant was required to perform certain duties specified in such order which required the Long Island Railroad Company to immediately erect gates across the traveled roadway of Bridge street, on the southerly side of the main track of the said, the Long Island Railroad Company, and also across the traveled roadway or roadways of Water street, upon, or about upon, a line in continuation of the westerly side of Bridge street, and that a person or persons, from May first to November first in each year be stationed by the said, the Long Island Railroad Company, at or near said gates, to open and close the same when an engine or train passed and repassed.

E. B. Hinsdale, for the appellant.

Wilmot M. Smith, district attorney, for the respondent.

DYKMAN, J.:

“At any point where a street, highway, turnpike, plank-road or traveled way is crossed at the same level by a railroad, or at any point where a horse railroad is crossed by a steam railroad, the Supreme Court or County Court may, upon the application of the local authorities, and upon ten days' notice to the railroad corporation whose road so crosses, order that a flagman be stationed at such point, or that gates shall be erected across such street, highway, turnpike or plank-road, and that a person be stationed to open and close such gates when an engine or train passes, or make such other order respecting the same as it deems proper. Such order shall only be made after the refusal or neglect of such corporation to station such flagman or erect such gates after having been requested so to do by such local authorities.” (Laws of 1884, chap. 439, § 3.)

The Long Island Railroad Company operates a portion of its railroad through the village of Sag Harbor, and under the statute above recited the county judge of Suffolk county, on the 10th day of January, 1887, made an order requiring the Long Island Railroad Company to immediately erect gates across the traveled road-way of Bridge street, in that village, on the southerly side of the main track of the company, and also across the traveled road-way of Water street, in the same village, and to station a person or persons, from May first to November first in each year, at or near such gates, to open and close the same when an engine or train passed or repassed. The gates were erected in obedience to such order, but upon complaint of neglect and omission to operate the same an indictment was found by the grand jury of Suffolk county against the company for a willful omission to station a person at or near such gates to open and close them when engines and trains were passing. A trial was had under such indictment and the company was convicted and fined \$500 for such offense. From that conviction the company has appealed. The indictment was based upon section 154 of the Penal Code, which is as follows:

“Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.”

The section of the law placed at the head of this opinion prescribes no penalty for disobedience of any order made by the county judge, and provides no method for its enforcement, and, therefore, so far as any order is made in pursuance of its provisions, imposing a duty upon any public officer, or any person or corporation holding a public trust or employment, obedience thereto must be enforced under section 154 of the Penal Code. Under such construction and application of the statutes, the indictment charges an offense and is sufficient to sustain the conviction.

The great objection raised to section 3 of the Laws of 1884 is that it delegates legislative power to the judges, and is, therefore, unconstitutional.

It is quite true that the duty of posting flagmen and placing gates at railway crossings can only be imposed by the legislature, but, as we understand the statute in question, it only provides a means to determine the necessity of a flagman or a gate at any particular place; and when such necessity is found by the judge the law requires their presence. In the same way the legislature must authorize the location and construction of railroads; but there is a statute which prohibits the construction of a railroad upon and along any highway without the order of the Supreme Court (Laws of 1864, chap. 582), but it has never been supposed that any legislative power was delegated to the court by that statute. Such laws are only designed to provide for a judicial determination of the cases in which legislative enactments shall have operation, or, in other words, to determine the necessity for such operation.

In relation to the indictment and the testimony we find both sufficient to sustain the conviction, which should be affirmed.

PRATT, J., concurred; BARNARD, P. J., dissenting.

Conviction and judgment affirmed.

**AMMUND TONNESEN, APPELLANT, v. P. SANFORD ROSS
AND JOSEPH B. SANFORD, RESPONDENTS.***

Negligence — when a question for the jury.

In an action brought to recover damages alleged to have resulted to the plaintiff, who was employed on a scow which received mud from a dredging machine owned by the defendants, it appeared that after the plaintiff had been at work a few days for the defendants, one Delamater, the captain in charge of the dredging machine, swung the bucket over and struck a shaft which the plaintiff was turning with a wrench, as a result of which the plaintiff was seriously injured. The evidence tended to establish the fact that the captain was drunk at the time; that the plaintiff had seen him drunk on three occasions during his employment of eight days; that the captain always ran the dredging machine, and that the plaintiff did not tell the defendants of the fact that the captain was addicted to drink, nor did he leave their employment on that account.

No direct proof was given that the defendants knew of the habits of Delamater, although it appeared that the defendants' superintendent was at Weehawken where the dredge was at work every other day, and was there on the day on which the accident happened.

Held, that it was a question for the jury, under the circumstances of this case, whether the defendants or their superintendent had knowledge of the habits of Delamater, and also whether the plaintiff was guilty of omissions which precluded his recovery.

APPEAL by the plaintiff Ammund Tonneson from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 27th day of May, 1890, in favor of the defendants, dismissing the plaintiff's complaint on the merits.

The action was brought to recover damages alleged to have been sustained by the plaintiff through the alleged negligence, and while

*The following dissenting opinion was written by Judge PRATT both in the above-entitled case of *Ammund Tonnesen v. P. Sanford Ross and Joseph B. Sanford*, and also, and more particularly, in a case of similar character of *John Thompson v. The Same Defendants*, in which latter case there was an appeal by the defendants from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 19th of April, 1890, in favor of the plaintiff, after a trial at the Kings County Circuit before the court and a jury, at which a verdict was rendered in favor of the plaintiff for the sum of \$1,000; and also from an order denying a motion for a new trial made upon the minutes of the court.

Robert D. Benedict, for the defendants, appellants.

J. Edward Swanstrom, for the plaintiff, respondent.

he was in the employ, of the defendants, and was tried at the Kings County Circuit before the court and a jury.

J. Edward Swanstrom, for the appellant.

Robert D. Benedict, for the respondents.

BARNARD, P. J.:

The defendants were contractors engaged in dredging the bottom of the Hudson river near Weehawken. The superintendent was one Vincent, and the captain in charge of the dredging-machine was one Delamater. The plaintiff was an employee of the defendants, working on the scow which received the mud from the dredging-machine. The dredging was done by steam, and the buckets were handled from the mud machine or dredger. The plaintiff had been at work but a few days for the defendants, from the 21st to the 29th of September, 1888. On the 29th of September, 1888, while the plaintiff was at work on the scow, the captain, Delamater, who controlled the same from the pilot-house of the dredge, swung the bucket over and struck the shaft which the plaintiff was turning with a wrench. The wrench was made thereby to spring up so that it struck the plaintiff and seriously injured him, paralyzing his arm and breaking his jaw. The evidence tended to establish that the captain was drunk at the time. The plaintiff had seen him drunk on three occasions during the employment of eight days. The captain always ran the machine. The plaintiff did not tell the defendants of the fact that the captain was addicted to drink, and did not leave the employment on that account. It is easily to be inferred from the evidence that but for the recklessness caused by strong

PRATT, J. (dissenting):

The verdict for plaintiff went upon the sole ground that defendants employed in their business an overseer or "captain," who was by his habits of intoxication rendered an improper person to be intrusted with such work, and that defendants were chargeable with notice of his incompetence.

In answer to this it is shown by plaintiff's testimony that he was fully aware of the captain's incompetence, and continued thereafter to work under him without objection or complaint.

It appears that plaintiff's brother worked under the captain two years before the plaintiff entered on the employment, and he testifies that during these two years the captain was an habitual drunkard.

drink the accident would not have happened. The captain had full view of the situation and could regulate the bucket with certainty and precision if his judgment was not affected by his condition. Proof was given tending to show that the captain was in an intoxicated condition as often as two or three times a week, and this was his usual condition for nearly two years before the accident, during all the time he worked for the defendants. The defendants' superintendent, Vincent, was at Weehawken every other day, and was there the day on which the accident happened. No direct proof was given that the defendants knew of the habits of Delamater. The plaintiff was nonsuited. The rule of liability in the case is, that the master was bound to use reasonable care, to provide and employ competent and skillful servants, and to discharge on notice or knowledge, or the means of knowledge, any who fail to continue such. (*Laning v. N. Y. C. R. R. Co.*, 49 N. Y., 521.)

The case of *Chapman v. Erie Railroad* (55 N. Y., 579) does not change this rule. The point decided in that case was, that a master did not owe the same care in finding out bad habits after employment as he did in the original employment. There was proof in the case that the defendants' division superintendent knew of the drunkenness of the employee, and the court held that the action was made out so far as to go to the jury. The superintendent was so frequently at the dredge during its use by Delamater, and the habits were proven to be so settled and continuous that it was a question for the jury to pass upon as to his knowledge or means of knowledge.

Negligence is a question of fact usually, and whether the plaintiff

Plaintiff testifies that, before he went there, he had often been told that the captain was drunk, and that during his term of service and before the accident he had himself been a witness to the captain's intoxication. Speaking of the captain, he says. "I saw him like a crazy man pretty near every day; * * * he looks drunk pretty near of every day," and goes on to say that, before he went there, his brother many a time told him the captain was drunk.

Upon this testimony it must be held that the plaintiff took the hazard of working under an intoxicated man. The motion for nonsuit should have been granted.

The judgment must be reversed and new trial granted, with costs to appellant.

Judgment and order denying new trial affirmed, with costs.

was guilty of omissions which permitted his recovery, assuming the master's negligence to be proven, was also a question for the jury. The character of the act, the circumstances of the case and the condition of the parties were things to be considered in determining the question of contributory negligence. (*Thurber v. Harlem, B. M. and F. R. R. Co.*, 60 N. Y., 331.)

The judgment should, therefore, be reversed and a new trial granted, costs to abide the event.

DYKMAN, J., concurred; PRATT, J., dissenting.

Judgment dismissing complaint reversed and new trial granted, costs to abide event.

Cases

DETERMINED IN THE

FIRST DEPARTMENT

AT

GENERAL TERM,

December, 1890.

EDWARD E. GOLD AND FREDERICK W. WRIGHT, APPELLANTS, v. JAMES CLYNE AND OTHERS, RESPONDENTS.

Liability of the directors of a corporation for a failure to file an annual report — effect of the expiration of the existence of the corporation before the debt, under the terms of a contract made by it, became due.

It is an action brought to charge the directors of the Central Park Building Company (Limited), with an alleged liability of said company, because of a failure to file an annual report of its financial condition, it appeared that the company had been incorporated in 1888, under chapter 611 of 1875, to continue for two years from the date of filing its certificate, which was filed on June 6, 1888; that, on April 28, 1884, the corporation entered into a contract with the plaintiffs, by which the latter were to furnish and put up a steam-heating apparatus in the buildings of said company, and made all payments called for under the terms of the contract, up to and until the payment which was to be made on the final completion of the work, which was finished on the 7th day of December, 1885.

Held, that as the existence of the corporation ended in June, 1885, by the terms of its certificate, and as at that time no debt was due to the plaintiff from the corporation, that the defendants were not liable.

That the provisions of section 38 of chapter 611 of 1875, to the effect that: "The dissolution, for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution," did not cover this case, as no liability had been incurred by the corporation for the amount sought to be recovered in this action until the contract had been fulfilled, before which time the corporation had ceased to exist.

APPEAL by the plaintiffs from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 14th day of November, 1889, in favor of the defendants, dismissing the plaintiffs' complaint on the merits, after a trial before a referee.

Ira D. Warren, for the appellants.

Henry Thomson and *George A. Strong*, for the respondents.

VAN BRUNT, P. J.:

The defendants were directors of the Central Park Building Company (Limited), and the action was brought to charge them with liability for an alleged debt of the company as a penalty for a failure to file the annual report of 1885. The corporation was organized in 1883 under the business act of 1875 (chap. 611), and was, by its articles of incorporation, to continue for two years from the date of filing its certificate. This was filed on or about the 6th of June, 1883, and no annual report was ever filed. On the 23d of April, 1884, the corporation entered into a contract with the plaintiffs to furnish and put up steam-heating apparatus in four buildings known as the Navarro Flats, for which said company agreed to pay the plaintiffs \$25,000 in four separate payments. The plaintiffs at once commenced work on their contract and received payments from time to time until the sum of \$15,333.32 had been paid, which comprised all the payments which were to be made under the contract prior to the final completion of the work.

The plaintiffs completed their work according to the terms of their contract on or about the 7th of December, 1885.

Upon this state of facts the learned referee found in favor of the defendants, and from the judgment thereupon entered this appeal is taken.

The decision of the learned referee was put upon the ground that the existence of the corporation ended in June, 1885, by the terms of its certificate, and at that time no debt was due to the plaintiffs from the corporation.

It is claimed, however, that, by virtue of section 38 of the act of 1875, notwithstanding the dissolution of the corporation, their remedy still existed. Section 38 is as follows:

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“Section 38. The dissolution for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution.”

And it is urged that, by section 18 of the act in question, the directors must, within twenty days from the first of January in each year, file an annual report, and if they fail to do so a liability is imposed upon them generally and severally to pay all debts then existing or that shall be contracted before such report shall be made.

Attention must be called to the words of the statute making the directors liable for “all debts then existing,” and it is probable that the meaning of this term is the one which must control the decision of this case. It is easy to see the reasons why section 38, above quoted, was passed because it had been held in the cases of *McCulloch v. Norwood* (58 N. Y., 562) and *Sturges v. Vanderbilt* (73 id., 384), that the dissolution of a corporation, even, terminated an action then pending, and that all subsequent proceedings against the defendant were void unless the action was continued by an order of the court as provided by the Laws of 1832 (chap. 295). If an action actually pending against a corporation terminated by the expiration of the term of its existence, it is clear that no action could be commenced against a corporation after its dissolution; and the dissolution referred to in this case was a dissolution by expiration of time, and the action had to be revived by order of the court precisely the same as in the case of the decease of an individual, pending action.

In order to avoid this condition of affairs, undoubtedly, section 38 was inserted in the statute to which attention has been called. This brings us to a consideration of what section 18 means when it imposes a liability to pay all debts then existing and that shall be contracted before such report shall be made.

It is urged, upon the part of the appellants, that even though the debt may not have existed during the existence of the corporation, yet it had been contracted during such existence. Upon that point the case of *Garrison v. Howe* (17 N. Y., 458), seems to be conclusive, and our attention has not been called to, neither have we been able to find, any adjudication interpreting in a different manner the language of the statute there construed, which is precisely the same as that of the section referred to in the case at bar.

In the case cited a contract had been entered into by the corporation with the plaintiff to furnish lumber for which they were to pay a certain price. Subsequent to the entering into the contract there was a default in the filing of the annual report, but such omission was repaired prior to the time of the delivery of the lumber, and the court held that the debt for the lumber furnished under the contract subsequent to its execution was not contracted when the agreement was signed. And the court say: "If the statute were simply a remedial one, it might be said that the plaintiffs' case was within its equity; * * * but the provision is highly penal, and the rules of law do not permit us to extend it by construction to cases not fairly within the language," and that the statute contemplated the simple case of a debt contracted during the default in making the report.

Attention may be called to the case of *Leggett v. Bank of Sing Sing* (24 N. Y., 283), where a different interpretation was placed upon words of similar signification, but yet of a different character. It was there held that a provision in the articles of a banking association that the shares of its stock should not be transferable until the shareholder shall discharge all debts due by him to the association, includes liabilities of the shareholder which have not yet matured; and that such a provision creates a valid lien as against the assignee of the shareholder who takes with knowledge thereof while the shareholder is under a contingent liability as indorser, and gives no notice to the bank of his claim until the indorser's liability had become fixed. In that case the shareholder was an indorser upon the note held by the bank which at the time of the transfer of the stock was not due. After the transfer he became charged as indorser, and it was held that the language in the articles of association included the liability of an indorser who had not been charged as indorser, the note not having become due.

It may be claimed that the case of *Garrison v. Howe* is not applicable to the case at bar, because at the time that the debt became due in the case cited the default did not exist, the trustees of the corporation having filed the annual report, whereas in the case at bar no such annual report was ever filed. We think, however, that this makes no difference, because at the time at which the debt became due and the liability arose the corporation was dead; so

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dead that even actions against it abated. No action could be commenced against it except by the permissive force of the statute passed for the purpose of meeting this contingency. But for all purposes of corporate action, and of the action of its directors or trustees as such, it had ceased to exist, and consequently there was no corporation in being which could perform the act of filing the annual report.

We think, therefore, that the corporation having ceased to exist before the debt arose, that there was nothing to which the statute could apply, as it was evidently not intended that a default having occurred there was no possibility of its ever being repaired.

Even if it were not for the rule laid down in the case of *Garrison v. Howe*, above cited, we think, upon principle, it would be necessary to come to the same conclusion. The ground upon which the appellant bases his appeal seems to be that, in the case of an executory contract, the debt arises from the moment that the contract is signed. This, clearly, cannot be so, because, *non constat*, the contractor may never complete his contract. In the case at bar the payment, which forms the subject-matter of this action, was not to be due until the completion of the contract, and it was uncertain at the time of the death of the corporation whether anything whatever would become due to the contractor, because he might never complete his contract. In other words, a debt cannot be contracted until a liability has been incurred, and no liability had been incurred by the corporation until the contract had been fulfilled.

Under all the circumstances, therefore, we are of opinion that the statute did not intend to impose a penalty upon the trustees of a corporation for not doing a corporate act after the corporation had ceased to exist.

The judgment appealed from must be affirmed, with costs.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed, with costs.

ALBERT P. MILLER, RESPONDENT, v. THE NEW JERSEY STEAMBOAT COMPANY, APPELLANT.

Common carrier — what constitutes a refusal to give accommodations to colored persons.

In an action brought to recover the damages alleged to have resulted to the plaintiff from the refusal of the defendant, a common carrier, to furnish the plaintiff with accommodations on its steamboat, it appeared that the plaintiff, a colored minister, had applied to the defendant and obtained for himself and family berths upon the boat. Subsequently he applied to the purser to exchange the berths for state-rooms, and, at the suggestion of the purser, saw the captain, with whom he had some conversation, after which he was informed by the purser "no other arrangement will be made." The plaintiff thereafter stated to the purser that if he could get no state-room accommodations he would have to leave the boat and asked for his money, which was refunded to him. It appeared upon the trial that the purser had given state-rooms, after the application made by the plaintiff, to other parties.

Upon the trial the court charged the jury: "I am inclined to think that the plaintiff has made out a cause of action of about this width and extent," to which the defendant excepted and requested the court to charge that if the plaintiff voluntarily left the boat, then no cause of action accrued to the plaintiff, which request was refused.

Held, that the court erred in such refusal, as the evidence did not show that there was any demand for a state-room, except in exchange for the berths which the plaintiff had already secured, which exchange the defendant was not bound to make.

Semble, that the case should have been submitted to the jury upon the question whether the refusal to exchange the berths for state-rooms was made on account of the plaintiff and his family being colored persons, and whether, for that reason, they were refused the privileges extended to the white passengers. (Per DANIELS, J.)

APPEAL by the defendant, the New Jersey Steamboat Company, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 1st day of March, 1890, in favor of the plaintiff; and also from an order, dated the 26th day of February, 1890, which denied defendant's motion for a new trial on the minutes of the court, and that the verdict be set aside, as against the weight of evidence and for excessive damages, after a trial at the New York Circuit before the court and a jury, at which a verdict was rendered by the jury in favor of the plaintiff for the sum of \$500.

W. P. Prentice, for the appellant.

H. L. Brant, for the respondent.

VAN BRUNT, P. J. :

This action was brought to recover damages for the refusal by the defendant, a common carrier, to furnish the plaintiff accommodations on its steamboat.

The facts sworn to by the plaintiff are briefly these : The plaintiff, a colored minister, on the afternoon of August 10, 1887, applied to the defendant for passage for himself and family, consisting of his wife, two children and mother-in-law, from New York to Albany on defendant's boat the "Drew." And having ascertained at the purser's office what the tickets would cost, and desiring to save expense, and at the same time to be as comfortable as possible, he concluded to take berths, the wife, children and mother-in-law going to berths in the ladies' compartments and the plaintiff having a berth elsewhere. The plaintiff found that these berths would cost two dollars apiece, passage and everything, and accordingly paid for the berths and was immediately directed to the ladies' saloon, where he and his family were met by the stewardess, who conducted them to the ladies' cabin to some berths in the rear, where berths were assigned to his wife, mother-in-law and two children. They sat down their little bundles and were told by the stewardess they could not keep them there because there were others who were to come there and there was no room.

The plaintiff further testified that there was only a small passageway, and that they turned around and said : "These berths are so very small ; we don't see how we can get along with two children and two women," whereupon his wife said, "Suppose, Albert, you go to the purser and get a state-room ; they only cost fifty cents more. Get two state-rooms." He then returned to the purser and said : "Well, Mr. Purser, I would like to exchange these berths ; we find them too small for comfort, inadequate for proper accommodation ; we want things as comfortable as we can ; we cannot make ourselves comfortable in those berths because we have children, and have no place to put little bundles for them or anything of the kind." The purser

said: "I cannot make the change without the consent of the captain." The plaintiff then sought out the captain and had some conversation with him, and the captain saw the purser and had some conversation with him, whereupon the plaintiff asked the purser "What is the pleasure of the captain, sir?" His reply was "No other arrangement will be made." After waiting a little while the plaintiff sought out the purser again and said: "If you cannot do better than this, sir, and you have not had us to understand that you had no state-room accommodation, we will have to leave the boat and you will please give me my money. We would rather leave the boat than go up in this shape."

The witness further testified that at the time he came back he saw the purser give state-rooms to other parties. The purser replied "I cannot do that without the consent of the captain." The plaintiff went after the captain again, who returned with him to the purser's office, and after a while his money was refunded to him. The plaintiff then said "I cannot help the color of my skin any more than you can the color of your eyes. It seems too mean that an American citizen shall be treated in this manner right in the city of New York." He had some further conversation in regard to the officers of the company and then left the boat. The plaintiff further testified that he had never been told by any of the officials that there were no state-rooms.

Upon the trial the learned court charged the jury: "I am inclined to think that the plaintiff has made out a cause of action of about this width and extent," to which the counsel for the defendant duly excepted; and requested the court to charge that if the plaintiff voluntarily left the boat, there was no cause of action, which was refused.

We think that the learned court below fell into an error in supposing that the evidence showed that there was any demand for a state-room except in exchange for the berths which the plaintiff had already secured.

We have searched the case in vain to find any proof of this description. The demand upon the part of the plaintiff was to exchange the berths which had been assigned to him, and for which he had paid, for a state-room, which seemed to him, after examination, to be preferable and better suited to his wants. The evidence

shows that when the money paid for these berths was returned he left the boat, and made no demand after that time for a state-room.

We think, under these circumstances, no cause of action was made out. Whatever may have been the duty of the defendants toward the plaintiff they were not bound, after he had bought and paid for these berths, to exchange them for a state-room. They were under no such legal obligation, although they may have been under a legal obligation to furnish the plaintiff with a state-room the same as other travelers upon a demand made by him for the same and an offer to pay. But there is no offer to pay for a state-room except by the return of tickets which he had received for the berths, and possibly offering to pay the difference in price between the berths and the state-room. The plaintiff had bought the berths and the defendants were willing to comply with the contract which the payment of the plaintiff called upon them to fulfill. But the plaintiff was not satisfied with those accommodations and desired others. He demanded an exchange, and nothing else but an exchange. After having sold these berths to the plaintiff, and he having secured them, the defendants were not bound to rescind this contract and buy back the berths and run the risk of selling them over again. If, for his convenience, the plaintiff desired more ample accommodations, it was necessary that he should pay for them, and this he did not offer to do except upon the condition that the defendants would rescind the contract which they had already entered into with him by the sale of the tickets for the berths.

We think, for this reason, that there was a failure to make out a cause of action, and the learned justice erred in charging the jury that a cause of action had been made out in favor of the plaintiff.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

BRADY, J., concurred.

DANIELS, J. :

I concur, as the plaintiff failed to make out his right to maintain the action with such a degree of clearness as to justify the court in holding that he was entitled to recover. It was for the jury to decide whether the refusal to exchange the berths for state-rooms

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was made on account of the plaintiff and his family being colored persons, and for that reason refusing them the privileges extended to the white passengers. The evidence was sufficient to submit that question to them, but not to sustain the court in ruling that a cause of action, as matter of law, had been proved.

Judgment reversed and new trial ordered, with costs to the appellant to abide event.

HENRY HENTZ AND OTHERS, RESPONDENTS, v. ELIZABETH F. MINER, APPELLANT.

General denial — in an action on contract proof may be given, under a general denial, that it was a wager contract.

In an action to recover upon an account for money laid out and expended, and for commissions earned in the purchase and sale of wheat and coffee by the plaintiffs, as the agents of the defendant, the defendant interposed a general denial. Upon the cross-examination of one of the plaintiffs' witnesses, who had conducted the transactions out of which the alleged indebtedness arose, the defendant attempted to prove that it was the understanding of the parties, at the time that all orders were given for the purchases in question, that no merchandise whatever was to be delivered, but that the purchases and sales were to be settled for upon the basis of the differences in the market-prices. This evidence was objected to upon the ground that it was incompetent, irrelevant and immaterial and was excluded.

Held, that the defendant had a right, under a general denial, to prove anything tending to show that no valid contract was ever entered into, and, therefore, was entitled, in the case in question, to show that the purchases and sales were mere wager contracts and consequently illegal, and that the evidence was, therefore, improperly rejected.

APPEAL by the defendant Elizabeth F. Miner from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 27th day of December, 1889, after a trial before the court and a jury at the New York Circuit, at which a verdict was rendered in favor of the plaintiffs by direction of the court for the sum of \$2,513.53.

Samuel Ashton, for the appellant.

T. H. Dewey, for the respondents.

VAN BRUNT, P. J.:

The complaint in this action was for a sum due upon an account for money laid out and expended, and commissions in the purchase and sale of wheat and coffee by plaintiffs as the agents of the defendant. The defense alleged in the answer was a general denial.

Upon the cross-examination of one of the witnesses on the part of the plaintiffs, who conducted the transactions out of which the alleged indebtedness arose, it was sought to prove that it was the understanding of the parties, at the time the orders were given for the purchases in question, that no merchandise whatever was to be delivered, but that the purchases and sales were to be governed by the differences in the market-prices. This evidence was objected to upon the ground that it was incompetent, irrelevant and immaterial, and the same was excluded and an exception duly taken.

There was no claim that the evidence could not be offered under the pleadings as they stood; but it was objected to generally and excluded apparently as affording no answer to the claim made by the plaintiffs.

This, we think, was error. The defendant had a right to show, as matter of fact, if such was the case, that it was the understanding and intention of the parties at the time of these alleged purchases and sales that no actual deliveries were to be made or were contemplated; and, therefore, the contract was simply a speculative contract depending upon the result of the market, and that it was never intended to purchase any merchandise, but that the contract should be settled according to the differences in the market-prices. This would be a wagering contract and contrary to the statute. That such is the case is expressly recognized in *Bigelow v. Benedict* (70 N. Y., 202) and *Story v. Salomon* (71 id., 420), and no recovery could be had for losses or supposed losses thereunder.

It is urged upon the part of the respondents, however, that this was an affirmative defense which must be set up, and various authorities are cited which they claim establish this proposition. We have examined all those which were decided by the courts of this State, not thinking that authorities of a foreign State can construe the rules of pleading in this State authoritatively, and we find no such proposition whatever laid down in any of the cases.

Under a general denial of a complaint alleging a contract a defendant has a right to prove anything tending to show that no

valid contract was ever entered into. It is only in those cases where there is a confession and avoidance that it is necessary to plead the special facts constituting the defense. If the so-called contract forming the basis of the action never was in law a contract, because contrary to the law, a general denial authorizes the defendant to prove that fact. Therefore, in the case at bar, the defendant had a right to show that no valid contract for the purchase of merchandise was ever entered into between these parties, or ever contemplated in this transaction, and that they were merely wagering contracts intended to be settled by the payment, upon the one side or the other, of differences without the delivery of any merchandise. The evidence which defendant sought to introduce by the cross-examination of plaintiffs' witness tended to show this, and thereby the defendant brought herself within the rule laid down in *Bigelow v. Benedict* and *Story v. Salomon* (*supra*), in which it was held that contracts were not to be presumed to be illegal, but it was necessary to prove it.

We think, therefore, that because of the exclusion of this evidence, error was committed which calls for a new trial.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide event.

BRADY, J., concurred.

DANIELS, J. :

The plaintiff did not object to the form of the questions intended to elicit answers showing that the business out of which the claim arose was made up of gaming transactions. Neither was the objection taken that this evidence was not admissible under the pleadings; when that objection is intended to be relied upon it must be presented at the trial. The general objection which was presented to these questions, that they were incompetent, irrelevant and immaterial, did not justify the exclusion of the evidence offered as not being within the issue. (*Schwarz v. Oppold*, 74 N. Y., 307.)

The evidence was competent, relevant and material, and it could not be legally rejected as not being of that character. For these reasons the judgment should be reversed and a new trial ordered, as the opinion of the presiding justice concludes.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOHN WHALEN, APPELLANT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, RESPONDENT.

Railroad crossing where the view is obstructed — contributory negligence of one crossing the tracks — absence of flagman.

A party crossing in a wagon the tracks of a railroad, which are so obstructed by embankments that it is impossible for him to see an approaching train before reaching the tracks, is, nevertheless, bound, after he gets to the tracks and in a position to see, to look up and down as far as he is able, and his failure to do so constitutes contributory negligence on his part.

The fact that a party injured upon a railroad had, at times, seen a flagman at the place where he was injured, in the absence of evidence that he had habitually seen a flagman there, does not justify his assuming, in the absence of the flagman, that it is proper for him to cross the tracks.

Kellogg v. The New York Central and Hudson River Railroad (79 N. Y., 72) distinguished.

APPEAL by the plaintiff John Whalen from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 15th day of April, 1889, after a trial before the court and a jury at the New York Circuit, at which the plaintiff's complaint was dismissed upon the merits, with costs.

M. J. Keogh, for the appellant.

F. Loomis, for the respondent.

VAN BRUNT, P. J.:

This action was brought to recover damages for personal injuries sustained by the plaintiff because of the negligence of the defendant. Upon the trial the complaint was dismissed apparently on the ground of the contributory negligence of the plaintiff.

It appears from the evidence that the defendant is engaged in operating the New York Central and Hudson River Railroad, and that on the 27th of May, 1887, the plaintiff was driving an ice wagon, drawn by two horses, along Two Hundred and Sixth street, and while traveling upon that part which is crossed by the tracks of the railway was struck by defendant's engine and injured.

It further appeared that the plaintiff was going to deliver ice to a customer, whose store was on the west side of the track, and the

plaintiff was obliged to cross the track to get to the store to deliver ice. The street through which he was traveling descends to the track at a steep incline, running east and west and the defendant's tracks north and south. On the northerly side of the street there is a cut in the rock and trains in this cut are not visible to persons coming down the incline, and defendant's trains passing through this cut could not be seen for any great distance on account of the embankments, except from a point 100 feet east of the east rail of the easterly track, so that after a person passed that point there was no view along the tracks until the tracks themselves were reached.

The plaintiff swore that he had delivered ice at this store many times, and that he had before, at times, seen a flagman where this street crossed the track; that there was no flagman at the crossing at the time of the accident, and as he approached the track he was on the lookout for all signals and did not know anything until he was struck by the train. It further appears from his evidence that he was driving his horses upon a jog, not exactly a trot, faster than a walk, and had a big ice wagon; that he did not hear anything; that he was on the track before he saw the train; and that he neither stopped before crossing the tracks, nor did he look up or down after he got to the tracks, but that he looked straight ahead and went straight ahead. It further appears, from the construction of his wagon, that, without making some effort, it was impossible for him to look other than straight ahead, and that the first that he noticed the train, the horses were across the west track, and the next instant the plaintiff was hit. In another place he says the first he saw of the train was when the horses were between the rails of the track. This evidently refers to the rails of the west track, he having crossed the east track and having got on the west track before the accident occurred.

It seems to us that here was conclusive evidence of contributory negligence. Conceding that, until plaintiff reached the track, it was impossible for him to see an approaching train, yet he was bound, after he got to the tracks and in a position where he could see, to look up and down as far as he was able. This he utterly failed to do, or to make any use of his eyes whatever, looking straight ahead. It is clear that if, after he got beyond the cut, he had looked to see whether any trains were approaching he could have seen them.

But he took no such precaution. He took the risk and the accident was the result.

It is claimed, because he saw no flagman there and because he had before seen a flagman there, he had a right to assume that the passage was clear. But the difficulty is, that he had not habitually seen a flagman there. He testified that he had seen a flagman there at times, and, therefore, he knew that it was not the habit to keep the flagman there, and the absence of the flagman under such circumstances offered no invitation to him to cross the track without using ordinary precautions.

It is claimed that the case of *Kellogg v. New York Central and Hudson River Railroad Company* (79 N. Y., 72) is almost identical with the case at bar. An examination, however, shows a very material difference between that case and the case at bar. The deceased approached the track in a one-horse wagon; he was driving on a slight trot with one hand and holding a pail of butter in the other; that he was familiar with the locality, living near the crossing, and that he approached it when trains were due from both north and south, the wind was blowing from the north. The deceased was seen a moment before he was struck looking towards the north from which a train was then due; that the train approaching from the south struck and killed him. It was claimed that if he had looked towards the south he would have escaped harm. A verdict for the plaintiff was set aside by the General Term on the ground that the complaint should have been dismissed because of the contributory negligence of the deceased. The Court of Appeals held this was error, upon the ground that it was not proved that he was heedless; that the evidence showed that the deceased was apparently aware of the danger and that a train was at that time to be expected from the north, and there was also some obstruction interfering with sight in that direction. For a moment before the collision he was looking in that direction and the court say: "We cannot say that at that particular time he should have looked toward the south." And, under all the circumstances, the court thought that it was for the jury to determine whether he exercised that care which the law required of him.

In the case at bar the evidence absolutely fails to show the

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slightest attempt upon the part of the plaintiff to ascertain whether any trains were approaching, but he looked straight ahead, and his view straight ahead was limited by the construction of his wagon. He drove across the track heedlessly, taking no precautions whatever to look out for passing trains.

The facts are, therefore, essentially different from those of the *Kellogg Case*; and as the burden of proof is upon the plaintiff to show that he was not guilty of contributory negligence, there was no evidence from which a jury could infer that he had not been so guilty. The court was, therefore, right in dismissing the complaint and the judgment should be affirmed, with costs

BRADY and DANIELS, JJ., concurred.

Judgment affirmed, with costs.

ANNIE E. SMITH, APPELLANT, v. FLETCHER W. CAMP,
AS ADMINISTRATOR, WITH THE WILL ANNEXED OF MARY
ETTA CAMP, DECEASED, RESPONDENT.

Acknowledgment of an indebtedness — to avoid the statute of limitations it must be one intended to be communicated to the creditor.

An acknowledgment of an indebtedness, in order to prevent the running of the statute of limitations, must be one intended to be communicated to the creditor, or to influence his conduct, and a written memorandum made by the debtor, and kept in her possession up to the time of her death, and thereafter found among her papers by her executor, is not such an acknowledgment as will take the claim out of the statute.

APPEAL by the plaintiff Annie E. Smith from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 30th day of April, 1890, in favor of the plaintiff; and also from an order denying plaintiff's motion for a new trial made upon the minutes of the court.

The action was brought to recover the sum of \$4,000, and was tried at the New York Circuit before the court and a jury, and a verdict was rendered in favor of the plaintiff for \$259.

E. H. Pomeroy, for the appellant.

W. Mitchell, for the respondent.

VAN BRUNT, P. J.:

This action was brought to recover the sum of \$4,000, with interest, being an amount alleged to have been loaned by the plaintiff to one Mary Etta Camp at various times prior to December 28, 1882. The complaint also alleged that on said December 28, 1882, the said Mary Etta Camp acknowledged, in writing, that she owed the plaintiff the said \$4,000 so loaned, and promised to pay the same, and signed said acknowledgment and promise.

Upon the trial it appeared that said Mary Etta Camp died in November, 1884, leaving a last will and testament, dated July 19, 1883, after the memorandum hereinafter mentioned. By said will James W. Camp was appointed executor, to whom letters testamentary were duly issued upon the probate of the will. The executor having died the defendant was duly appointed administrator with the will annexed. This action was originally commenced against the executor and after his death revived as against the administrator.

The answer denied the loan, acknowledgment and promise to pay and set up as a separate defense the statute of limitations, and the satisfaction of any claim by reason of said alleged loan by a legacy of \$5,000, bequeathed to said plaintiff by said Mary Etta Camp in her last will and testament.

The plaintiff offered in evidence a certain memorandum book of the said Mary Etta Camp, in the possession of the defendant, in which appeared the following in lead pencil in the handwriting of said Mary Etta Camp:

57 ST. MARK'S PLACE,
N. Y., *December 28th, 1882.* }

I, Mary Etta Camp, of the city of New York, now so reside, being of sound mind but of uncertain health, do make this my last will and testament in case I am not able to make out more fully a statement more minute in its details, to my sister Annie E. Smith must be paid, out of my estate, \$4,000 which I owe her and my debts which I may leave unpaid, to

Mary Etta Camp.

Mary Etta Camp.

Mary Etta Camp.

This memorandum remained in the possession of Mary Etta Camp in her lifetime, and on her death was found amongst her papers by

her executor and produced upon the trial by the defendant upon notice by the plaintiff. It does not seem to have been seen by anybody during the lifetime of the decedent.

There were certain other entries in the book put in evidence by the plaintiff, made since the 1st of April, 1881, amounting to \$175, which appeared to be the acknowledgment of receipts of moneys from the plaintiff by the decedent. The plaintiff offered to prove items in these books prior to April 1, 1881, aggregating a large sum of money, and similar to those mentioned running back to 1872.

This action having been commenced on the 9th of October, 1888, these items were considered to be barred by the statute of limitations unless they were revived by the acknowledgment of December 28, 1882, and they were, therefore, excluded.

The court thereupon directed a verdict for the sum of \$175 and the interest; and a motion having been made for a new trial, which was denied, from the judgment and order thereupon entered this appeal is taken.

The single question is, whether the memorandum dated December 28, 1882, was such an acknowledgment as took the claim out of the statute.

It is well settled that an acknowledgment to prevent the statute of limitations from running must be intended to be communicated to the creditor or to influence his conduct; the theory being that because of the promise and acknowledgment he has probably refrained from taking those steps which he otherwise would have taken to prevent the statute from running.

In the case at bar it does not appear that the memorandum in question was ever intended to be communicated to the creditor during the lifetime of the debtor, or in anywise to influence her conduct. In fact, the memorandum appears to be an informal attempt of Mary Etta Camp to make a will, and, as it was futile for such purpose, its objects cannot be perverted from that which was intended by the subscriber into an acknowledgment of an indebtedness which would be binding upon her. Even if it had been a will formally executed, it was revoked by the will of July 19, 1883, and an acknowledgment signed by a party, recalled before the creditor has knowledge of it, cannot possibly form the basis of a claim that the statute of limitations has ceased to run.

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The whole tendency of the decisions upon this subject is, that the acknowledgment must be communicated to the creditor for the purpose of influencing his action, or that it might influence his action.

It is not necessary to cite authorities on this subject. In the *Matter of Kendrick* (107 N. Y., 104) an acknowledgment under oath of an indebtedness was held to be insufficient to take the debt out of the statute, because it was not made to the creditor nor to his agent nor to any one acting in his behalf; nor was it intended to be communicated to him or to influence his conduct. And it was held that an admission, under such circumstances, to a stranger was not effectual to rebut the presumption of payment, or to revive a debt barred by the statute. Numerous other cases might be cited sustaining the principles already enunciated.

We think, therefore, that the judgment and order appealed from should be affirmed, with costs.

DANIELS, J., concurred.

BRADY, J.:

I concur with some reluctance.

Judgment and order affirmed, with costs.

NEWMAN COWEN AND OTHERS, APPELLANTS, v. CHRISTINA
ARNOLD AND OTHERS, RESPONDENTS.

Rent collected by a receiver, in advance, for a period extending beyond the date of the sale of the property — apportionment of the rent.

A purchaser at a sale under mortgage foreclosure, where a receiver, appointed to collect the rents during the pendency of the action, has collected the rent in advance for a period extending beyond the day at which the sale takes place, is entitled to an apportionment of the rent so received by the receiver, and to be paid such amount thereof as covers the period of time subsequent to the sale.

APPEAL by the plaintiffs from an order made at Special Term, and entered in the office of the clerk of the county of New York on the 5th day of March, 1890, which directed that the receiver in the above-entitled action pay to the plaintiffs' attorney certain expenses incurred by, and commissions owing to, the agent of the receiver,

and denied a motion to apportion the October rents of the mortgaged premises.

The action was brought for the foreclosure of a mortgage, and pending the action, and on March 29, 1889, a receiver was appointed of the rents, issues and profits of the mortgaged premises. Judgment was entered on July 8, 1889, and at a sale had thereunder the property was bid in by the plaintiffs, who received the referee's deed on the 4th day of October, 1889, prior to which time the receiver had received the October rents in advance, amounting to \$271.50.

The order appealed from was made upon an application, made on behalf of the plaintiffs, for an order directing the receiver to pay the plaintiffs the proportion of the October rents from the fourth day of October, and also to pay the amount due one Zittel, the assignor of the plaintiff, for his commissions in collecting the October rents, and for certain disbursements incurred in the care of the premises.

Lewis Sanders, for the appellants.

Charles H. Lovett, for the respondents.

BRADY, J. :

It appears that in this action a receiver of the rents and profits was appointed on the twenty-ninth of March last and collected the rents, which were payable in advance. The plaintiffs, as purchasers received their deed on the 4th of October, 1889, and made application that the receiver pay the plaintiffs' attorney, expenses of the agent, his commissions for collecting the October rents, and for disbursements in the care of the premises prior to October fourth, and the expenses incurred after the fourth of October, during that month, amounting to twenty-nine dollars, and also to apportion the rent for October to the plaintiffs. The plaintiffs were the assignees of the agent, Zittel, for value of his claims just mentioned.

The application for the payment of the agent's expenses and commissions, amounting to seventy-seven dollars and one cent, with interest, was granted and the amount directed to be paid, but the application to apportion the October rents was denied. A supposed difficulty which presents itself in the consideration of this appeal

arises from the fact that it is alleged by the receiver that the owner of the equity of redemption had not been served with notice of the motion, and this point is taken. It is quite clear that, so far as this appeal is concerned, the defendant Fink has no interest whatever in the fund that is left, for reasons which will appear. The rent was payable, as already suggested, in advance; but the only rent the receiver could take was for the first, second and third days of October, the delivery of the deed making him *functus officio* thereafter and entitling the plaintiffs to the rent accruing subsequently. Where the purchaser is ready and willing to perform, and the delay is on the part of the vendors, the purchaser is entitled to the rents and profits from the time when, according to the terms of the contract, possession should have been delivered, or if the vendor has remained in possession he is chargeable with the value of the use and occupation from the same period. (*Bostwick v. Beach*, 103 N. Y., 423.) The receiver's appointment was subject to the sale of the premises, the purchase of them under it, and the delivery of the deed and possession of the premises. Beyond the time when the purchase was completed his official relations to the parties did not exist, and he could not collect, on the first of October, the rent for the use of the premises from the fourth of October, although payable in advance, when the purchaser became entitled to the possession of the premises.

The learned counsel for the respondent suggests that in the absence of a statute or an express agreement to that effect rent can never be apportioned in respect to time, citing the following authorities: *Zule v. Zule* (24 Wend., 76); *The Mayor v. Ketchum* (67 How. Pr., 161); *Cheney v. Woodruff* (45 N. Y., 98).

These cases, with the exception of *Cheney v. Woodruff*, relate to actions brought against tenants, and that case is decisive of the inability of a purchaser at a foreclosure sale to recover the rent accruing between the time of the purchase and the delivery of his deed. None of these cases, therefore, has any application to the question in hand. All that the owner of the equity of redemption is entitled to in lands mortgaged, after the sale under the mortgage, are the rents which become due down to the period when the purchaser under the decree of sale becomes entitled to the possession of the land. (*Clason v. Corley*, 5 Sandf., 447.) If the rule con-

tended for, perhaps not seriously, by the respondents' counsel were to prevail, namely, that any rental of premises sold under foreclosure, which accrued by being payable in advance the day before the delivery of the deed, would belong to the owner of the equity of redemption, then the purchaser would be deprived of the beneficial enjoyment of the premises for such period as the rent covered, whether it was three months, six months or a year. This proposition, of course, is wholly untenable.

The order appealed from must be reversed and the motion ordered reheard at the Special Term, when, if necessary, the owner of the equity of redemption can be brought in.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Order reversed and motion sent back to Special Term to be reheard.

IN THE MATTER OF THE APPLICATION OF ROBERT SCHELL, ETC.,
FOR AN ORDER, ETC.

Two inconsistent orders made on the same motion — assignment by a client of his claim against his attorney — enforcement thereof by the assignee.

Where two separate, distinct and inconsistent orders are entered upon a single application to the court, with nothing upon the face of the papers to show that one order is to replace, or to be a resettlement of the other, a reversal will be ordered on appeal.

Where a client, having a claim against his attorney, arising out of transactions connected with that relation, assigns his claim, the assignee cannot take proceedings to compel the attorney to pay the money or in case he fails to do so to have him punished as for a contempt of court.

APPEAL by Peter A. Hargous from an order made at Special Term, and entered in the office of the clerk of the county of New York on the 26th day of March, 1889, directing that Peter A. Hargous pay over to Robert Schell the sum of \$3,251.31, received by him in an action in which Edward Schell was plaintiff and the Mayor, Aldermen and Commonalty of the City of New York were defendants, and, in case of his failure so to do, directing that a precept of commitment issue against him.

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The application was made by Robert Schell, as assignee of Edward Schell, in order to enforce a claim made by Edward Schell, because of moneys collected by Peter A. Hargous in a certain action in which Edward Schell was plaintiff and the Mayor, Aldermen and Commonalty of the City of New York were defendants.

The papers on appeal contained two orders, one under date of March 23, 1889, by which the matter was referred to Peter B. Olney, Esq., to take proof of the contracts and agreements made between Edward Schell and Peter A. Hargous for compensation for legal services in vacating or reducing a certain assessment for the Sixty-sixth street outlet sewer imposed on certain lots of said Edward Schell, etc., and the other under date of March 26, 1889, which directed that the said Peter A. Hargous pay to Robert Schell \$3,251.31, or that, in default of such payment, a precept of commitment issue.

M. B. Smith, for Peter A. Hargous, appellant.

John Delehunty, for Robert Schell, respondent.

VAN BRUNT, P. J.:

The papers in this case present the rather curious anomaly of two separate, distinct and inconsistent orders being entered upon a single application, with nothing upon the face of the papers to show that one order is intended to replace or be a resettlement of the other.

This practice is one that is not to be encouraged, and if no other reason existed, we think it would form a sufficient ground for a reversal of the order appealed from. But there are other points which seem to be fatal to the application, and these may as well be disposed of upon this appeal as at any other time.

It appears from the papers in the case that the appellant had been retained by one Edward Schell to vacate an assessment and subsequently to recover certain moneys paid to the mayor, etc., because of said assessment. It was claimed, upon the part of the appellant, that he had two distinct retainers, and that he was entitled under such retainers to retain the sum of fifty per cent of the recovery. The respondent, however, claims that he was only enti-

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tled to retain twenty-five per cent, and that the respondent was entitled to the payment of the balance. Edward Schell assigned his claim against the appellant to one Robert Schell, who brought this proceeding against the appellant for the payment of the money or his punishment for a contempt.

We do not think that an assignee of a claim against an attorney can avail himself of this summary remedy. It is a procedure strictly between attorney and client, as is recognized in the *Matter of Knapp* (85 N. Y., 284), and by the assignment of his claim against the attorney the client cannot assign his relationship. It is a grievance personal to himself. It is because of the relations existing between attorneys and clients, that the client is allowed to pursue this extraordinary remedy; and it is because it is the duty of the court to see that the attorney acts with fidelity, as well to the court as to the client, that it assumes this jurisdiction. There does not seem to be any principle upon which a stranger, simply because he has become the owner of a demand which had once been owned by a client, can seek this protection of the court. The court does not owe any duty to him. He has not confided in the attorney because of this summary jurisdiction which he might invoke for his protection, and he stands, therefore, in an entirely different relation to the attorney than that which the client occupies.

As already intimated, it is the duty of the court to see that an attorney acts with fidelity towards his client. No such obligation is placed upon the court as to strangers, and we have not been able to find any occasion on which such authority has ever been assumed or even hinted at. There certainly is no fiduciary relation existing between the assignee of a client and the attorney. Whatever obligations may exist between them are simply contractual, and the assignee in taking an assignment from a client of a claim against an attorney has no reason to suppose that he can claim against such attorney the penalties which a client may invoke. As already stated, the right depends upon the relationship; upon the credit given by the client to and the confidence reposed in the attorney because of his being an officer of the court. To hold that an assignee, who is a stranger so far as being the client of the attorney is concerned, should be able to invoke these extraordinary remedies would be to establish a principle which would entitle any creditor

of an attorney to resort to the same procedure. And, further, in this case there was a dispute as to what the contract was between the attorney and client, and it seems to us that unless it appears that this dispute was clearly frivolous, resort to these proceedings should not be encouraged.

The order should be reversed, with ten dollars costs and disbursements and the application denied.

BARTLETT and BARRETT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements and application denied.

GEORGE R. GIBSON AND OTHERS, RESPONDENTS, v. THE
AMERICAN LOAN AND TRUST COMPANY, APPEL-
LANT, IMPLEADED, ETC.

Trustee of a mortgage acting in bad faith to the bondholders—injunction.

Where it appears that a trust company, which has acted as trustee under a mortgage covering lands in another State, given by a corporation as collateral to bonds issued by it, has acted in bad faith in the prosecution of an action for the foreclosure of the mortgage, and in a manner prejudicial to the interests and rights of the holders of the bonds, such trust company, its officers, agents and attorneys, will be enjoined by the courts of the State of New York from taking any further proceedings in the matter, pending the final hearing and determination of an action for its removal as trustee, although the proceedings in foreclosure are pending in another State, and relate to real estate therein.

APPEAL by the defendant, the American Loan and Trust Company, from an order of the Supreme Court, made and entered in the office of the clerk of the county of New York on the 14th day of March, 1890, enjoining the defendant from taking any proceedings, under a decree entered in the District Court of Otoe county, Nebraska, on January 24, 1890, in an action in which the American Loan and Trust Company, trustee, was plaintiff, and the City Water Company of Nebraska City, and the Nebraska City Water and Light Company, and the American Loan and Trust Company, trustee, were defendants, or for the enforcement thereof, and from taking any proceedings or acting as trustee under a deed of trust made to the said, the American Loan and Trust Company, by the City Water

Company of Nebraska City, except to defend an action, brought by the same plaintiffs named in the action in which such order was made, in the District Court of Otoe county, Nebraska.

Robert L. Harrison, for the appellant.

E. Ellery Anderson, for the respondents.

DANIELS, J. :

The action has been brought in favor of the holders of bonds issued by the City Water Company of Nebraska City in the State of Nebraska. The total issue of the bonds amounted to the sum of \$150,000. Each bond was for the sum of \$1,000, and secured by a mortgage upon the property of the Water Company. This mortgage was executed and delivered to the American Loan and Trust Company of the City of New York in trust for the security and benefit of the holders of the bonds. The Water Company made default in the payment of interest upon the bonds, and at the request of the holders of sixty-one of the bonds the Trust Company commenced an action in the District Court of Otoe county, Nebraska, to foreclose the mortgage and sell the mortgaged property. Before this action was commenced, and after the execution and delivery of the mortgage, another corporation was organized in the city of Nebraska called the Nebraska City Water and Light Company. And after the organization of that company the City Water Company, the mortgagor, transferred its property, covered by the mortgage, to a person who conveyed it to the Nebraska City Water and Light Company, which then incumbered it by a mortgage for \$250,000. After this transfer and conveyance the grantee made additions to and improvements upon the property, and these facts were alleged in the petition for the commencement of the action for the foreclosure of the mortgage. That company answered the petition, alleging that it had purchased real property and built water-basins, and provided apparatus for the use of the company, and had obtained the performance of architect and engineering services, and that the amount expended therefor was necessary to keep the plant in running order and retain the customers of the City Water Company, and that it amounted to the sum of \$25,000, for which a priority was claimed in the action over the mortgage

to the Trust Company. Other answers were served in the action, but containing no allegations affecting this part of the action. And after the issues had been framed the cause appears to have been brought on for a hearing by consent of the parties and a decree was entered in conformity to the prayer of the petition, and, also, finding due to the Nebraska City Water and Light Company, as a first lien upon the property, this sum of \$25,000. No contest appears from the docket entry in the action to have taken place concerning the allowance of this sum of money, nor any adjudication by the court determining it to be a prior incumbrance upon the property to the mortgage previously given by the City Water Company. But what took place at the trial appears from the docket entry to have been the result of consent on the part of the attorneys and counsel representing the two water companies and the trustee to which the mortgage had been given. It further appeared that one of the attorneys who had been employed to and did represent the Trust Company in the commencement and prosecution of the foreclosure action was one of the incorporators of the Nebraska City Water and Light Company. The attorney who represented the mortgagor in the mortgage was also an incorporator in that company, and so was the attorney who represented and appeared for the Nebraska City Water and Light Company. And it was, accordingly, their interest to promote and maintain all such advantages as might be secured for the Nebraska City Water and Light Company, in preference to those of the Trust Company under the mortgage and the plaintiff in the foreclosure action. There was reason, therefore, for believing, in the disposition which was made of the foreclosure action by the judgment or decree agreed to be entered, that the rights and interests of the holders of the bonds secured by the mortgage had been so far disregarded and sacrificed, and that this had been done under the authority and with the connivance of the Trust Company itself.

When these facts came to the knowledge of the plaintiffs, measures were taken by way of correspondence to induce the Trust Company to permit the plaintiffs to be represented in the foreclosure action to secure a proper observance and vindication of their own rights under the mortgage. But this was declined on the part of the Trust Company, which refused to authorize or consent to such interference. And this refusal tended to confirm the belief that the

Trust Company was not in good faith prosecuting the foreclosure suit for the promotion of the interests and the protection of the rights of the holders of the bonds. And this action was thereupon commenced to obtain a judgment for the removal of the Trust Company as trustee under this mortgage, and for the appointment of another trustee to maintain and enforce the trusts created by its provisions. The complaint in the action prayed for the issuing of an injunction in the meantime restraining the Trust Company, its officers, agents, attorneys and servants, from proceeding in any way in the foreclosure action, and from executing the judgment or decree which had been entered, or taking any other steps or proceedings as trustee under the trust deed. And the court, considering these facts to have been established by the proofs produced in the case, continued the injunction which had previously been issued having this effect, but leaving the Trust Company at liberty to take such defensive measures, or receive such sums of money as should be necessary for the protection of the rights of the holders of the bonds.

In support of the appeal which has been taken from this order, the objection has been urged that the court is without jurisdiction to restrain the trustee from carrying on or consummating these proceedings in the District Court of Otoe county, in the State of Nebraska. And the case of *Cole v. Cunningham* (133 U. S., 107), and those cited in the course of the opinion, have been relied upon chiefly as authorities maintaining this objection. But neither that case, nor anything which was decided in *Phelps v. McDonald* (99 U. S., 298), has any tendency to sustain this objection. On the contrary, it is conceded, as it has frequently been held, where a necessity for the injunction appears to exist, that the courts of one State may enjoin the party within its jurisdiction from proceeding in an action pending in another State. And so it has been held, not only in this State but in others, as the authorities collated and discussed in *Cole v. Cunningham* clearly prove and establish. So far as objection has been taken to the jurisdiction of this court over this action, it is plainly without support. Neither can the action be defeated for the reason that all the owners of bonds secured by the mortgage are not made parties to it. For it has been brought by the plaintiffs as the owners of eighty-five of the bonds, forming more than a majority of those secured by the mortgage. And they are prose-

cuting it under the authority of section 448 of the Code of Civil Procedure, not only for the benefit of themselves, but of the other bondholders who may elect to make themselves parties to the litigation. This section has provided where the question is one of common or general interest of many persons, or where the persons who might be made parties are very numerous, and it may be impracticable to bring them all before the court, that one or more may sue or defend for the benefit of all. And as the holders of these bonds are numerous, that is a sufficient authority for the support of the action by these plaintiffs for their own benefit, as well as that of the holders of the other bonds.

The action is against the Trust Company, which is a corporation formed under the laws of this State, and it is, therefore, directly subject to the jurisdiction and authority of this court. Indeed, there would seem to be no other authority provided for the removal of the trustee beyond that which the courts of this State are authorized to exercise, for it is directly within the reach only of the process of this court, and subject to any judgment which may be recovered against it in the action. And that is sufficient to answer all the requirements of jurisdiction on the part of the court. For no disability appears to exist on the part of the plaintiffs preventing the prosecution of the action by them, even though a portion of them, as the affidavits show the fact to be, are not residents of the State of New York. The defendant is here, and if an equitable right exists for its removal, the plaintiffs are entitled to enforce that right through the instrumentality of this jurisdiction.

That the Water Company of Nebraska City may not be brought into the action by any proceeding which has been provided for the service of the summons upon a resident of another State will not necessarily defeat the action, for that company has no direct interest in the controversy existing between these bondholders and this trustee. It is not proposed, and could not be, to remove the trustee on account of any misconduct on the part of the Nebraska City Water Company, but the action has been brought for its removal, because of its own misconduct in consenting to the charge of this sum of \$25,000 as a superior lien upon the property covered by the mortgage, when, under the authority of the law, the City Water and Light Company was entitled to no such advantage. The

ground of the action is the alleged misconduct of the Trust Company itself, and no injury whatever can result to the Nebraska City Water Company from the removal of the Trust Company, as trustee under this mortgage; and, for that reason, if jurisdiction shall be incapable of being acquired over that company, this failure does not appear to constitute a defense to the action. But as to that no definite decision is required to be made, for the company may still appear and make itself a party to this litigation. But if it does not, then the question will for the first time arise whether the action can be maintained without that company becoming a party.

That the consent should not have been given, by which the expenses of improvements upon the mortgaged property were made a superior lien to the first incumbrance, appears to be reasonably well supported by the authorities, for they sustain the rule to be, where a mortgage has been given upon real estate, that improvements, or fixtures or machinery, afterwards added to or affixed upon the property, become subordinated to the preceding mortgage, and are liable for the payment of the mortgaged debt the same as the property to which the articles are afterwards annexed. This principle is settled by the following as well as other authorities: *Smith v. Goodwin* (2 Greenl., 173); *Frankland v. Moulton* (5 Wis., 1); *Winslow v. Merchants' Insurance Co.* (4 Metc., 306); *Pettengill v. Evans* (5 N. H., 54); *Butler v. Page* (7 Metc., 40); and in *Snedeker v. Warring* (2 Kernan, 170, 174), where it was said in the opinion that "permanent erections and other improvements made by the mortgagor, on the land mortgaged, become a part of the realty and are covered by the mortgage." And the same rule is equally as applicable where the improvements and erections shall be made by a party acquiring title under the mortgagor subsequent to the mortgage. And to the same effect is *McFadden v. Van Buren* (50 Hun, 361). And this principle has also been applied to growing crops upon land mortgaged, as will be seen by 1 Hilliard on Mortgages ([3d ed.] 180, note C.)

If the Trust Company authorized its attorney and counsel to consent to the subordination of the lien of the mortgage to the expenditures alleged to have been made upon the mortgaged property, then, certainly, it is chargeable with that degree of misconduct which may properly result in its removal. (*People v.*

Norton, 5 Seld., 176; *Quackenboss v. Southwick*, 41 N. Y., 117.) And that this consent resulted from its preceding authority, or subsequent acquiescence, may be inferred from the papers in the case exhibiting what has taken place and the refusal of the Trust Company to permit any person representing these plaintiffs from intervening for their own protection in the foreclosure action.

The inability of this court to appoint another trustee under the mortgage, in case the Trust Company shall be removed, will not defeat the action, for, by the eighth paragraph of the mortgage it has been provided that a majority in number and value of the bondholders may, by an instrument in writing, under their hands, duly acknowledged or proved, and recorded in Otoe county, appoint or select one or more person or persons, or any other corporation, to be a trustee under the mortgage in case of the removal of this Trust Company. This provision secures ample authority to the bondholders to select a trustee to execute and enforce the trusts and obligations created by the mortgage if this Trust Company shall be removed by the judgment of this court from its position. And that, certainly, tends to restrict this litigation to the determination whether the trustee shall or shall not be removed from its office under the mortgage. And to that extent there seems to be no well-founded objection to the jurisdiction or authority of this court.

The order from which the appeal has been taken should, therefore, be affirmed, with ten dollars costs and the disbursements.

VAN BRUNT, P. J., and BRADY, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

FANNIE W. READING, RESPONDENT, v. JAMES B. HAGGIN,
APPELLANT.

Action for an account of the management and sales of land in another State—when it is not necessary to allege that the defendant has money belonging to the plaintiff—jurisdiction of the courts of the State of New York.

An action was brought to compel the rendering of an account by the defendant concerning the management and disposition of certain lands situate in the State of California, as to which a contract had existed between the plaintiff and defendant, by which certain of the lands were to be conveyed by the plaintiff to the defendant, and other lands were to be acquired by the defendant under the purchase and foreclosure of a mortgage thereon, all of which property the defendant was to sell, at such time as he deemed advisable, and after repaying to himself the amount expended by him was to pay to the plaintiff one-third of any excess over and above the same, and to himself retain the other two-thirds.

The plaintiff alleged that the land was conveyed by her pursuant to the contract with the defendant, and that other property was purchased under a mortgage foreclosure as contemplated by the contract, and that defendant thereafter had sold said lands, or part thereof, and out of the proceeds of said sale had retained all money expended by him in the purchase, and all disbursements made in connection with such lands, but had failed to account for and pay over to the plaintiff one-third of the excess of the moneys received, and demanded judgment for an account of the dealings and transactions of the defendant under his contract, and of the moneys received and expenditures made by him, and that he pay to her such sum as might be found to be due to her.

To this complaint the defendant interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action.

Held, that while the complaint did not allege, unless by way of inference, that the defendant had money arising from the execution of the trust created by the agreement, which should be paid over by him to the plaintiff, that, nevertheless, the plaintiff was entitled to a full and clear exposition and statement of what had been done by the defendant in the management and disposition of the estate.

That it was not indispensable that the plaintiff should allege that the defendant had funds in his hands, obtained from the property, which he should pay to her. It was further objected that the complaint stated no cause of action, within the jurisdiction of a court of the State of New York, for the reason that the lands were situate in the State of California, and their management was confined to that State.

Held, that as to the question relating to the conduct of the defendant in the management and disposition of the lands, and the uses made by him of their proceeds, that the courts of the State of New York had jurisdiction over the subject-matter of the action.

FIRST DEPARTMENT, DECEMBER TERM, 1890.

APPEAL by the defendant James B. Haggin from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 25th day of February, 1890, in favor of the plaintiff, overruling the defendant's demurrer to the plaintiff's complaint.

Charles B. Alexander, for the appellant.

Charles M. Da Costa, for the respondent.

DANIELS, J.:

The plaintiff commenced this action for an accounting by the defendant concerning the management and disposition of lands situated in the State of California. It is stated in the complaint that in July, 1871, she entered into a contract with him for a valuable consideration, to make and deliver to him a good and sufficient deed of all her right, title and interest in and to a tract of land known as the Reading Ranch, or so much thereof as would constitute 20,000 acres, and for which he,

"Agreed among other things to purchase a certain mortgage on said estate known as the Hensley mortgage, and so much of the indebtedness against said estate of Pearson B. Reading, as he may deem proper, and to cause said property of said estate to be sold to satisfy said indebtedness, and defendant further agrees that if at such sale of said estate he shall purchase said estate, he shall hold the said property so purchased together with the property so agreed, as aforesaid, to be conveyed to him until such time as he deems advisable, when he may sell and dispose of the entire tract of land so purchased by him and so conveyed to him by the plaintiff, until such time as he deems advisable, and out of the proceeds of said sale shall retain all moneys by him expended in the purchase of the said land and of said claims in and about the said land for taxes or expenses thereon or in connection therewith, together with the interest thereon from the date of payment at the rate of one per cent per month, and shall pay to plaintiff the one-third of any excess over and above any such advancements, outlays and expenditures with the interest as aforesaid, defendant retaining the other two-thirds."

The complaint further states that she, thereupon, and about the same time conveyed the land to him. And about two months thereafter executed and delivered another deed of the same property to him,

to more fully carry out the terms of the agreement first entered into. It is then alleged that the

“Plaintiff is informed and believes that defendant, in accordance with the terms of said agreement hereinbefore in paragraph first of this complaint mentioned, did purchase the mortgage on said Reading Ranch, known as the Hensley mortgage and other indebtednesses, against the estate of Pearson B. Reading, deceased, and did cause the said property, known as the Reading Branch, to be sold to satisfy said mortgage and other indebtednesses, and did cause the said property so sold to be conveyed to himself, and thereafter did sell and dispose of said lands or part thereof, and out of the proceeds of said sale did retain all moneys by him expended in the purchase of said land and of said claims and in about the land for taxes or expenses thereon or in connection therewith, together with interest from the date of payment at the rate of one per cent per month.

But defendant has failed to account for and pay over to plaintiff one-third of the excess of the moneys or any of the moneys received by him on said sale of said property over his advancements, outlays and expenditures, and has neglected and refused to pay and account for the same, although he has been continuously requested and urged to do so; and defendant is and remains accountable to plaintiff for said one-third of the excess of the moneys received by him on said sale of said property over his advancements, outlays and expenditures.”

And in addition thereto, that on or about the 15th of June, 1888, he delivered to her a statement of receipts and disbursements, but so general, vague and indefinite that it failed to give her accurate and definite information concerning the execution of the trust which he had undertaken, as that was set forth in the agreement made between them. And judgment is then demanded for an account of the dealings and transactions of the defendant under this contract, and of the moneys received, and expenditures made by him, and that he be adjudged to pay her such sum as might be found to be due and owing to her.

The ground of objection stated in the demurrer is, that the complaint failed to state facts sufficient to present a cause of action. But while it is true that it is not alleged, unless by way of inference, that the defendant has money, proceeding from the execution of the

trust created by the agreement, which should be paid over by him to her, still, what was done under the agreement to carry it into effect and by himself since that time in the management and disposition of the estate, entitled her to a full and clear exposition of its affairs. The business had been in progress for upwards of eighteen years, and it was due to the plaintiff that she should be accurately informed of what had transpired, and of the present condition of the part of the estate remaining unsold. And that she could only obtain voluntarily or involuntarily from the defendant. It was not indispensable that she should allege that the defendant had funds in his hands obtained from the property which should be paid to her. That she could not do in the absence of information from him exhibiting the condition of the estate. And she became entitled to that information for the purpose of ascertaining whether he withheld from her moneys obtained from the property which he ought to pay over. That was the scope and design of the action, and it seems to be within the limits of the authorities. Upon this subject it has been said that wherever the account stands upon equitable claims, or has equitable trusts attached to it, the jurisdiction is absolutely universal. And that cases of accounts between trustees and *cestuis que trust* may properly be deemed confidential agencies, and are peculiarly within the appropriate jurisdiction of courts of equity. (1 Story's Eq. Jur. [5th ed.], §§ 454, 465.) The beneficiary is entitled to an account of the acts and management of the trustee, or *quasi* trustee, and if it cannot be voluntarily obtained, then to the aid of a court of equity to secure it. And that is the ground upon which the case of *Marvin v. Brooks* (94 N. Y., 71, 80, 81) appears to have been decided. And that the trust or fiduciary obligations there related to money to be invested in property, and here in property to be managed and disposed of for the joint benefit of the parties, will not interfere with this application of that decision. If the jurisdiction extended to the former, it necessarily must include the latter. The case of *Uhlman v. New York Life Insurance Company* (109 N. Y., 421) in no way infringes on this statement of the jurisdiction, for the plaintiff failed there because the element of a trust was held not to enter into it.

The cases so numerous cited by the defendant's counsel were brought on entire contracts before the period for their complete per-

formance had expired, and have no application to this action. They were actions at law depending upon the fact of full performance for their success and do not now need to be specially examined. While here the action is supported by the plaintiff's right to an account, of which she has been deprived by the defendant.

In support of the demurrer it has been further objected that the complaint states no cause of action within the jurisdiction of this court, for the lands are situated in the State of California, and their management was confined to that State. But the action does not so much relate to the lands as to the conduct of the defendant in their management and disposition and the uses made by him of their proceeds. And over that, as the defendant has been found within this State, this court has jurisdiction. This general subject was at an early day considered in the case of *Massie v. Watts* (6 Cranch, 148), where, after an examination of the authorities, it was concluded that, "upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." (Id., 160.) And that very aptly includes this case, and it has since been followed without dissent. (*Watkins v. Holman*, 16 Peters, 25, 57; *Sutphen v. Fowler*, 9 Paige, 280, 282; *Newton v. Bronson*, 3 Kern., 587; *Gardner v. Ogden*, 22 N. Y., 327.)

It is not necessary to consider whether this objection is within the comprehension of the demurrer. For it is sufficient that it has no legal foundation to support it. Upon neither of these objections, nor any incidents of them entering into the subdivisions of the argument, was the defendant entitled to succeed. But the judgment should be affirmed, with costs, with leave to the defendant to answer in twenty days, on payment of the costs of the demurrer, and the costs and disbursements of the appeal.

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment affirmed, with costs, with leave to the defendant to answer in twenty days on payment of the costs of the demurrer and the costs and disbursements of the appeal.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
EDWIN M. WORTH, APPELLANT, *v.* HUGH J. GRANT,
MAYOR OF THE CITY OF NEW YORK, RESPONDENT.

The granting of a license to have an exhibition in the city of New York is discretionary with the mayor.

Under section 1998 of chapter 410 of the Laws of 1882, providing that an exhibition shall not take place in the city of New York until "a license for the place of such exhibition, for such purpose, shall have been first had and obtained," and section 1999 providing that "the mayor of the city of New York is hereby authorized and empowered to grant such license, to continue in force until the first day of May next ensuing the grant thereof, on receiving for each license so granted, and before the issuing thereof, the sum of five hundred dollars," it is discretionary with the mayor whether he will grant a license or not.

The court cannot be called upon to substitute its judgment for that of the mayor on an application for a *mandamus* to compel the latter to grant the license.

APPEAL by the relator, Edwin M. Worth, from an order made at Special Term, under date of November 5, 1890, and entered in the office of the clerk of the county of New York on November 7, 1890, which denied a motion that a peremptory writ of *mandamus* issue to be directed to the respondent Hon. Hugh J. Grant, mayor of the city of New York, requiring him to act, upon the application for a license filed with him, by the relator, Edwin M. Worth, and directing him to grant to the said relator, on receiving the sum of \$500, a license to give vocal and instrumental concerts, and to give museum exhibitions, without stage scenery or apparatus, on premises located and known as Worth's Museum, 492 Sixth avenue, in the city of New York.

A. J. Dittenhoefer and David Gerber, for the appellant.

Charles Blandy and William H. Clark, for the respondent.

BARRETT, J. :

The above statement sufficiently indicates the character of this appeal. The relator contends that the mayor is not vested with discretionary power in the premises, and that upon tender of the fee specified in the statute (Consolidation act, § 1999) he is absolutely entitled to the license asked. The respondent, on the other hand, contends that the question whether the license shall issue rests in his sound discretion. Whether a duty imposed upon a public

officer is imperative or discretionary is always a question of legislative intention. "Each case," as Judge DILLON observes in his work on Municipal Corporations (§ 98), "must be largely decided on its own circumstances and the legislative intent gathered from the whole act. No positive or stereotyped rule can be laid down." Keeping this doctrine in mind, cases which might otherwise seem to conflict are easily reconcilable. To illustrate: In *Perry v. The Mayor* (7 How. Pr., 81), Judge MITCHELL held that the mayor's discretion to license a stage-driver was absolute, that he was not bound to assign any reason for his decision, and that impeachment was the only remedy for an abuse of power. In the *People ex rel. Osterhout v. Perry* (13 Barb., 206), Judge HARRIS held that the mayor of Albany was absolutely bound to grant a license (to carry on the business of booking emigrant passengers) to any person who brought himself within the terms of the act. The conflict here is but seeming. The ordinance under consideration in *Perry v. The Mayor* authorized and required the mayor to issue licenses to as many persons as he might think proper, and to revoke the same at his pleasure (p. 84), while the act of 1848 (chap. 219, § 7), which was construed in the *People v. Perry*, conferred no such broad authority, but simply provided that no person should exercise the vocation of booking emigrant passengers without keeping a public office for the transaction of that business, "*nor without the license of the mayor, * * * for which shall be paid the sum of \$25 per annum,*" and giving a satisfactory bond to the mayor as security for the proper manner in which the business should be conducted. The italicized phrase was the only expression of authority contained in that act, and Judge HARRIS, while intimating that it would have been better if the legislature had authorized the mayor to grant or withhold licenses in his discretion, held that such discretion could not be inferred from the language quoted; that the only discretion vested in the mayor was that of determining whether or not the bond offered by the applicant was satisfactory, and that if any further discretion had been contemplated, "the rules of interpretation require us to suppose such intention would have been distinctly expressed."

The language employed in the consolidation act is not as broad as that used in the ordinance under review in *Perry v. The Mayor*,

nor as narrow as the expression contained in the act construed in *The People v. Perry*. Section 1998 provides that the exhibition shall not take place until "a license for the place of such exhibition *for such purpose* shall have been first had and obtained." Then follows section 1999, the material part of which reads as follows :

"The mayor of the city of New York is hereby authorized and empowered to grant such license, to continue in force until the first day of May next ensuing the grant thereof, on receiving for each license so granted, and before the issuing thereof, the sum of five hundred dollars."

The relator's contention is, that these words, "authorized and empowered," should be construed as imperative, and he cites authorities for the proposition that permissive words may sometimes be treated as mandatory. This proposition will not be denied, but the question is, whether the circumstances here call for such a construction. The rule undoubtedly is, that where public bodies or officers are empowered to do that which the public interests require to be done, and adequate means are placed at their disposal, the proper execution of the power may be insisted upon though the statute conferring it be only permissive in its terms. (*Mayor v. Furze*, 3 Hill, 612.) The word "may" is thus construed at times to mean "must." But why, it may be asked, should this construction be given to the act under consideration? What public interest demands that the mayor should be required under all circumstances to accept the fee and grant the license? It seems to me that it is quite the other way. The public good clearly requires that the permissive words in question should be read in their natural and ordinary sense. The title which heads these sections is "Amusements," and a system follows, regulating places of public entertainment in important particulars. Exhibitions upon Sunday are forbidden (§ 2007); so are public masquerades (§ 2008); so is the sale of wine, beer or strong or spirituous liquors (§ 2010); so is the presence of minors under the age of fourteen unaccompanied by an adult person. The whole act is plainly within the police power, and the payment of license fees to the Society for the Reformation of Juvenile Delinquents is a mere incident.

In *Wallack v. The Mayor* (3 Hun, 84), the same view was taken

of the act of 1872, from which the sections of the consolidation act already referred to were drawn. That act was entitled "An act to regulate places of amusement in the city of New York." (Laws of 1872, chap. 836.) It was of this enactment that DAVIS, P. J., in the case cited, observed:

"The chief object of this act is to provide for the regulation of places of amusement in the city of New York, by placing them under the control of the public authorities through a system of licenses to be granted by the mayor on the payment of a fixed fee."

The learned judge further observed that: "It might be no difficult task to show that the system of licenses, and its consequent preclusion of unworthy exhibitions, from which license is or ought to be withheld, is greatly advantageous to such establishments as the plaintiff's by preventing the degradation of all such performances in the public estimation, which would be quite certain to grow out of the promiscuous and unrestrained exhibitions which would spring up in the absence of legal restrictions."

The relator lays great stress upon the fact that the license is not for the entertainment itself, but for the place where it is to be given. But the language is, "for the place of such exhibition *for such purpose*;" that is, for the purpose of the proposed entertainments. The applicant must, therefore, specify the purpose as well as the place, and the inquiry which the mayor may then properly institute is not limited to the applicant's characterization of his intended performances. If the applicant openly avows an immoral purpose, surely the mayor is not bound to facilitate the execution of such purpose. If, however, the purpose is apparently proper, the mayor may look beneath the surface and ascertain the real purpose; and if, upon investigation, that purpose, in his judgment, is inimical to good order and public decency, he may properly withhold the license. It would, indeed, be a remarkable construction, subversive of the entire object sought to be attained by the act, which would compel the mayor to license an avowedly indecent exhibition or a disorderly place of entertainment. The relator insists that even under such circumstances the license must be granted, and that the only remedy is to treat the exhibition as a nuisance, and check it by the operation of the criminal law. This, however, would be entirely inadequate. The purpose disclosed

or ascertained might be grossly immoral and yet outside the Penal Code. It is no answer to say that after the license is obtained the manager may change his plans and foist an improper exhibition upon the public, or that he may lease to another who will do likewise. That may be, and yet it furnishes no good reason for depriving the mayor of the exercise of original judgment. On the contrary, it is an argument in favor of careful discrimination in the first instance. But even if the mayor's authority were limited to *the place*, without regard to the purpose, his discretion remains. The locality of play-houses, circus pavilions, concert halls and the like is clearly a matter of public concern. It may well be, for example, as Mayor Grant has decided in the present instance, that a building for the exhibition of curiosities with the enlivenment of music and song, erected upon the site of "The Argyle and the Haymarket," formerly notorious resorts, would be likely to attract the evil characters who are said to abound in the neighborhood, and who were formerly patrons of the resorts named. The question of the neighborhood was thus highly important, and it was clearly a question upon which the mayor might exercise his judgment.

The view which we have taken of the act under consideration is fully supported by the authorities. In *Morse v. Edson* (Supr. Ct., MS. opinion) Mr. Justice INGRAHAM carefully examined the subject, and, in an able opinion reviewing the cases, arrived at the conclusion that the power to license was discretionary. Since that case was decided the same conclusion was arrived at with regard to a similiar act in *The People ex rel. Dorr v. Thacher* (42 Hun, 349). In the latter case the language used was also permissive. It was held that it would be contrary to the policy of the law to treat it as mandatory, and that it was intended to be permissive "in view of the object and end to be answered by an observance of the right conferred." *The Commonwealth ex rel. Miller v. Stokley* (12 Phil., 316), is cited by the relator as an authority against the claim of discretion. An examination of the case, however, will show that the language of the act was mandatory, "which license *shall* be granted upon the payment," etc., and that the decision was regretfully placed upon that express ground.

Other questions are discussed upon the appellant's brief, but they are not entitled to serious consideration upon this appeal. For

instance, the argument against the constitutionality of the act. That argument certainly does not advance the relator in the direction of a *mandamus*. It is only by ignoring the law, and proceeding without a license, that he can raise that question.

It is not necessary to consider the question whether the discretion is, under any circumstances, reviewable. The relator contends that, if it exists at all, the discretion is qualified by the requirement of good faith. He insists, in other words, that it is not an arbitrary discretion, but one which must be reasonably exercised. There are cases where an abuse of discretion may be controlled by *mandamus*. (Topping on Mandamus [Am. ed.], 66; *Village of Glencoe v. The People*, 78 Ill., 382.) But the difficulty here is, that the court cannot substitute its judgment for that of the officer. To do so would be, in effect, to usurp the power to grant the license. (*People ex rel. Wilson v. Supervisors of Albany*, 12 Johns., 414.) But this subject need not be pursued, for the reason that the relator has not made out a case of this extreme description. Many of his statements, it is true, are expressly admitted or not denied, but his averments of good moral character, and his intention to give proper and moral performances, are explicitly denied. The mayor expressly puts his refusal to license the relator upon two grounds: First, that he is not, in the mayor's judgment, a man of such character as to render him a proper person to be entrusted with the license; and, second, that it would be dangerous to the good morals and welfare of the community to license the premises in question. Several facts are stated, somewhat generally, it is true, in support of these positions, and it is, therefore, impossible, to treat the mayor's decision in the matter as an abuse of discretion. Certainly, the relator has made out no case for a peremptory *mandamus*, for the facts upon which he claims that the mayor's conduct was arbitrary and oppressive are sufficiently in dispute to raise an issue upon that head; and an alternative *mandamus* was not asked.

It follows that the order denying the application for a peremptory *mandamus* should be affirmed, with ten dollars costs and the usual disbursements.

VAN BRUNT, P. J., and BARTLETT, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

FREDERICK A. DUNN, APPELLANT, v. THE NEW HAVEN
STEAMBOAT COMPANY, RESPONDENT.

Loss of money and chattels from his berth by a passenger, through the negligence of a steamboat company—charge of the court in reference to the plaintiff's negligence.

A passenger on a steamboat retired for the night to his berth, where he had with him seventy-three dollars in bills, a gold watch worth sixty or seventy dollars; a gold pen and pencil worth three dollars; railroad tickets for which he paid six or seven dollars, and a silver watch whose value was unknown. These articles he placed in his vest, which was put under his pillow, and when he awoke in the morning the vest and these articles had been stolen.

In an action brought to recover their value from the steamboat company, it was charged that the loss had arisen through the negligence of the persons in charge of the steamer.

The court charged the jury that if they found that it was a negligent act for the passenger to have this amount of money in his berth under the circumstances, instead of giving it to the employees of the company to take care of, that the defendant was entitled to a verdict.

Held, that this charge was erroneous; that even if it was negligence for the plaintiff to have this money in his berth, it in no degree contributed to the loss of the other articles which he had in his vest, nor did it affect his right to recover their value.

The court also charged that the plaintiff had a right to carry these things with him on his trip, but not to retain them in his berth.

Held that under this charge the jury might have inferred that the plaintiff had no cause of action because of his having taken these articles into his berth, and that the charge was erroneous. (VAN BRUNT, P. J., dissenting.)

APPEAL by the plaintiff Frederick A. Dunn from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 28th day of March, 1890, dismissing the plaintiff's complaint, with costs; and also from an order denying a motion for a new trial, made on the minutes of the court and entered in the office of the clerk of said county on the 26th day of March, 1890, after a trial at the New York Circuit before the court and a jury, at which a verdict was rendered in favor of the defendant.

The action was brought to recover certain money, and the value of certain chattels, which were lost by the plaintiff while he was a passenger on the defendant's steamboat, "Elm City," on a voyage from New York to New Haven, in the night-time, which loss

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was alleged to have been occasioned through the negligence of the defendant.

Hyland & Zabriskie, for the appellant.

William J. Kelley, for the respondent.

DANIELS, J. :

The plaintiff was a passenger on the defendant's steamer from the city of New York to New Haven. He paid his passage-money and received a ticket for the trip, with the number of his berth on its back. He testified that he had with him when he retired seventy-three dollars, in bills; a gold watch, worth sixty or seventy dollars; a gold pen and pencil for which he paid three dollars; railroad tickets, for which he paid six or seven dollars, and a silver watch he had repaired for his brother, for which no value was given, and that these articles were in his vest and placed under his pillow. And that when he awoke in the morning the vest and those articles had been stolen. This evidence was not contradicted.

It was charged in the complaint that the loss was owing to the negligence of the persons in charge of the steamer, which was denied by the defendant. And whether the charge had been sustained was a question for and submitted to the jury. In its submission by the court the legal rules on which the action depended were plainly and clearly brought to the attention of the jury. But, as is usually the fact, that satisfied neither of the counsel. And each requested further instructions, some of which they were not entitled to have submitted to the jury. Among these requests was one by the defendant's counsel in which the court was asked to charge: That if the jury believe the plaintiff was guilty of negligence in disposing of his property in the way he did it is a bar to his recovery. And that was answered by the court :

I so charge. If you find that it was a negligent act for him to have this amount of money in his berth, under the circumstances, instead of giving it to the employees of the company to take care of, if you find affirmatively that that was negligence, then the defendant is entitled to a verdict.

And to that the plaintiff excepted. It did not follow, even if it was negligent for the plaintiff to have this money, which amounted to seventy-three dollars, in his berth, that he should be thereby

defeated altogether in his action. Yet the court so instructed the jury. The direction gave them to understand that the plaintiff must be defeated, if it was negligent for him to have that money in his berth, even though the theft had resulted from the carelessness and inattention of the persons in charge of the business of the steamer. This was an erroneous direction, for such negligence on his part in no way contributed to the residue of the loss, or affected his right to recover the value of the gold watch, the gold pen and pencil, and the railroad tickets, which it was not negligent to carry in this manner.

The court was also requested by the plaintiff's counsel to charge that a passenger on such a steamboat has a right, when he retires, to retain such articles as those the plaintiff had in his possession at the time of retiring. That, the court at first left "it to the jury to say whether, under all the circumstances, that would be justified." The counsel then asked the court again to charge that proposition, and the response was: "He has a right to carry them with him on his trip, but not to retain them in his berth." And to that the plaintiff's counsel excepted. The jurors may be assumed to have been men of plain sense and experience, who would not consider the charge qualified with these particular directions with the legal acumen of persons having a long course of professional training. But they would be very liable to be impressed with the conviction that the plaintiff had no ground of action because of his improper conduct in taking these articles into his berth. The statement was without qualification that he had no right to retain these articles in his berth. And it followed from that direction, as jurors would commonly understand it, that he had no right to complain of their loss by theft. These directions were so plainly given that the jury was not liable to misunderstand them or to fail to act upon them. And their attention would not be diverted from them by what had been very properly said to them previously in the charge. They were the last directions, and as they were so plainly given, must have improperly determined the jury against the plaintiff.

The judgment and order should, therefore, be reversed and a new trial directed, with costs to the plaintiff to abide the result.

BRADY, J., concurred.

VAN BRUNT, P. J. (dissenting):

This action was brought to recover the value of certain personal property claimed to have been lost by the plaintiff while a passenger on the defendant's boat, the "Elm City," on a voyage from New York to New Haven in the night-time.

It appeared from the evidence that the plaintiff had been a traveling salesman for some time prior to the occurrence in question, and that in December, 1883, he took passage on the "Elm City" for New Haven, leaving New York at 11 P. M. He paid seventy-five cents for his passage ticket. He knew that there were state-rooms on the boat and had used them before himself, but on this occasion he did not take one. A berth was assigned him, the number of which was put upon the back of the ticket. He placed some of his baggage in charge of the officers of the boat, but kept his money and jewelry. The berth occupied by the plaintiff was in the main cabin, which was brightly lighted when he retired, and was lighted when he woke up in the morning. There was a porter in the cabin on watch when he went to bed; and he testified that when he woke up and discovered his loss the porter was not in sight. It appeared that, upon retiring, the plaintiff took off his vest, putting into it his money, his scarf pin, gold pen-holder and some railroad tickets, folded it up and put it under his pillow.

The evidence further showed that, upon the night in question, there was a watchman in the cabin and two on the deck, and the two deck watchmen went through the cabin every fifteen minutes, and the captain two or three times. There was a safe in the office for securing the valuables of passengers if they saw fit to deposit them; and there was some dispute as to whether any notice of the existence of such safe was posted in the cabin or not.

Upon the trial the learned court charged the jury that the defendant was a common carrier, and was bound to carry the plaintiff, who was a passenger, to his destination; that it was bound to take care of the property or baggage that a passenger intrusted it to carry, and that for the property intrusted to its care it would be responsible if the employees of the company failed to deliver it safely at the end of the journey. And that as to such portion of his baggage or wearing apparel as a passenger retained control of and did not give to the agents of the company a different rule applied. The obliga-

tion that the company assumed when it furnished the plaintiff with a berth was to take the care an ordinarily prudent person would take to protect him during the time he was asleep; it was to do what a prudent person would do under the circumstances; not any particular thing, but to use such vigilance as an ordinary prudent person under the circumstances would have used to protect the passenger from molestation and his baggage from robbery. And the question submitted to the jury was whether the defendant had exercised that degree of care toward the plaintiff and his property. The jury found a verdict for the defendant, and from the judgment thereupon entered this appeal is taken. It seems to be sought to impress upon the defendant the liability of an innkeeper. We fail to find any parallel between the obligation of an innkeeper and of a common carrier. The rule has been well settled that as to the personal property which the passenger takes charge of himself the common carrier is to use only ordinary care. He is not an insurer. If this plaintiff had seated himself in the cabin of the defendant and placed his property upon a chair beside him and it had been stolen, there would be no question as to the liability of the common carrier except upon proof showing that the carrier had been negligent in the management of its vehicle of transportation. The rule is entirely different as to those articles which the passenger places under the control of the employees of the common carrier, or in the case where he hires a room upon which there is a lock furnished by the carrier where he has placed his goods entrusting them to the lock so furnished, from the case where the manual custody of the goods themselves is continuously in the passenger.

In the case at bar the condition of the plaintiff was precisely the same as though he had laid down upon a sofa in the cabin to sleep; and the principle of liability of a common carrier has not been carried so far as to insure the goods of a passenger if he was robbed under those circumstances. Unless there was negligence upon the part of the common carrier in taking that ordinary care to prevent the happening of such an occurrence the right of recovery would not exist. And this is all the duty which the defendants owed to the plaintiff — ordinary care; and this the jury found that he had received at its hands, and, consequently, held that he had no right

to recover. There is one exception, however, which it is necessary to especially notice. The plaintiff's counsel made the following request:

"I ask your Honor to charge also, as matter of law, that a passenger on a steamboat, such as this was, has a right, when he retires, to retain such articles as those the plaintiff had in his possession at the time of retiring."

"The COURT — That I refuse to charge as a matter of law. I leave it to the jury to say whether, under all the circumstances, that would be justified."

This request was to the effect that the plaintiff had a right to recover, which, as already seen, was not necessarily the case, and it was for the jury to determine whether such was the fact or not, and, therefore, the court was justified in the refusal. The plaintiff's counsel excepted to the refusal of the court, and then asked the court again to charge that proposition. The court replied: "He has a right to carry them with him on his trip, but not to retain them in his berth."

It is urged that this was directing a verdict for the defendant. But it will be seen from the context that the plaintiff's counsel was urging the court, as matter of law, to charge that he had a right to retain them in his berth, and the answer of the court was to the effect that he had a right, as matter of law, to carry them with him on the trip, but not, as matter of law, to retain them in his berth at the risk of the defendant; and this was all that this charge meant, and because the learned counsel, after insisting upon the court charging that which it had refused to charge, got the opposite proposition from that which he was contending for, he has no reason to complain.

There seems to have been no error and the judgment and order appealed from should be affirmed, with costs.

Judgment and order reversed and new trial ordered, with costs to the plaintiff to abide the result.

JOSEPH J. O'DONOHUE AND JAMES T. MCGOVERN,
ADMINISTRATORS OF JAMES MCGOVERN, DECEASED, RESPOND-
ENTS, v. ZACHARIAH E. SIMMONS, APPELLANT.

Jury — need not be thoroughly satisfied in a civil action — when the sheriff's negligence or fraud discharges the obligation of a bond of indemnity.

In an action brought to recover upon a bond of indemnity, given to protect a sheriff in seizing certain property under an execution, the judge charged the jury, in reference to the conduct of the auctioneer who had been employed by the sheriff to sell the property: "I think it fair to say to you that you ought to be thoroughly satisfied that the conduct of the auctioneer was not merely negligent or careless—not a mere oversight. Before concluding the sheriff should lose his indemnity, because of the auctioneer's acts, you should be quite satisfied that the latter was acting in bad faith."

Held, that the court, in stating to the jury that they should be thoroughly satisfied, gave them an incorrect standard as to the conclusiveness of the proof required; that in a civil action the jury need not be satisfied of any fact claimed to be proven; that if there is a preponderance of evidence in favor of the fact, they are bound to find accordingly whether they are thoroughly satisfied or not; that the charge was also incorrect in stating that fraud must be shown in order that the indemnity should be lost.

APPEAL by the defendant Zachariah E. Simmons from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 10th day of May, 1889, in favor of the plaintiffs; and also from an order denying the motion for a new trial made upon the minutes of the court before which the trial was had.

The action was brought to trial at the New York Circuit, before the court and a jury, and a verdict was rendered in favor of the plaintiff for the sum of \$9,963.

A. Kling, for the appellant.

J. M. Smith, for the respondents.

PER CURIAM :

This action was brought to recover upon an indemnity bond given to the sheriff indemnifying him against seizing, under execution, property which he judged to belong to the defendant in the action in which such execution was issued.

The two important questions which were presented upon the trial were: First, whether the defendant had ever executed and delivered the bond set forth in the complaint; and, secondly, whether the negligent and illegal acts of the sheriff had not discharged the defendant from the terms and conditions of the bond.

This action has been tried three times. The record presents only one question which requires notice.

The bond of indemnity to the sheriff upon which the suit is brought was designed to protect that officer against the consequences of his official acts, particularly his act in taking the goods which he judged to belong to the defendant in the execution. It was not intended to afford protection in case of any misconduct or violation of duty by the sheriff or his agents, and the court so held on the previous appeal.

The appellant now insists that the learned judge who presided at the trial committed an error which calls for a reversal of the judgment because of the following charge:

"If a sheriff takes a bond of indemnity and employs a competent and proper auctioneer to sell the property, it may seem to you to be a hardship that the sheriff should lose his indemnity because that auctioneer misbehaves himself. Now, while I do lay that down as a rule of law, yet I think it fair to say to you that you ought to be thoroughly satisfied that the conduct of the auctioneer was not merely negligent or careless, not a mere oversight. Before concluding that the sheriff should lose his indemnity because of the auctioneer's acts, you should be quite satisfied that the latter was acting in bad faith and was guilty of misconduct tending to affect the sale seriously. In other words, the element of fraud here comes in, and the misconduct on the part of the auctioneer which would destroy the indemnity should be carefully distinguished from mere carelessness or oversight."

The learned counsel for the appellant excepted to the portion of the charge just quoted, in which it was stated that something more than mere negligence on the part of the auctioneer must be shown to make the sheriff liable in discharging the bond of indemnity. We think that this portion of the charge was in conflict with the opinion of the court upon the previous appeal.

The court also, in stating to the jury that they should be thoroughly satisfied that the conduct of the auctioneer was not

merely negligent or careless, was giving them an incorrect standard as to the conclusiveness of proof. In a civil case the jury need not be thoroughly satisfied of any fact claimed to be proven. If there is a preponderance of evidence in favor of the fact, they are bound so to find whether they are thoroughly satisfied or the proof is conclusive to their minds or not. And, furthermore, the charge was incorrect in stating that fraud must be shown in order that the indemnity should be lost.

There might be negligence and carelessness of the grossest kind without its amounting to fraud, and, in fact, such negligence or carelessness may amount to misconduct without the element of fraud entering therein. And the rule laid down upon the previous appeal was that if any property was lost by the misconduct of the officer the sureties would not be liable. It was not laid down that fraud must be shown, but simply that, unless the officer executed his process with fidelity, and with reasonable diligence, he could not claim his indemnity. In attempting to import the element of fraud into the consideration of this question, the fact seems to have been lost sight of that the indemnity is given to the sheriff for his protection in the execution of the process; and in protecting the rights of his indemnitors he is bound to use reasonable diligence and care. If he is careless or negligent in the execution of the process, he cannot claim indemnity against those persons who have agreed to stand between him and loss, provided he executes the process with due care and diligence.

By the instruction referred to the jury were necessarily misled, and for this error the judgment must be reversed and a new trial ordered, with costs to appellant to abide event.

Present — VAN BRUNT, P. J., and BARTLETT, J.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE METROPOLITAN CONCERT COMPANY (LIMITED),
RESPONDENT, v. HOWARD A. SPERRY AND ANOTHER,
APPELLANTS.

Costs — against an assignee of the cause of action — sureties upon an undertaking, who prosecute the action brought by their principal, are not liable for the costs — remedy of the defendant.

Section 8247 of the Code of Civil Procedure, in relation to the payment of costs, only applies to a case where the cause of action has been transferred to the party sought to be charged with costs, or he has become beneficially interested therein.

That section does not cover a case in which a surety upon an undertaking, given upon obtaining an order of arrest, applies to the court to set aside a default made by the plaintiff in that action, and to be permitted to prosecute, and does prosecute, the same. (BRADY, J., dissenting.)

Semble, that the remedy of the defendant, in the action in which the order of arrest was obtained, must rest upon the undertaking given by the sureties.

APPEAL by the defendants from an order made at Special Term, and entered in the office of the clerk of the county of New York on the 2d day of July, 1890, which denied the defendants' motion for leave to issue an execution against the property of Theodore Hellman and Emil Carlebach, sureties for the plaintiff in the above-entitled action.

The order was made upon a motion to compel Theodore Hellman and Emil Carlebach to pay \$344.59 costs, for which a judgment had been entered in favor of the defendants, in an action brought against them by the Metropolitan Concert Company (Limited), in which an order of arrest had been made, the undertaking given upon issuing which had been signed by said Theodore Hellman and Emil Carlebach as sureties.

Howard A. Sperry, for the appellants.

Eugene Seligman, for the respondent.

DANIELS, J.:

The action was commenced by the plaintiff to recover the value of certain property, and an order of arrest was made under which the defendants, or one of them certainly, was held to bail. This

order was afterwards vacated and the complaint in the action was finally dismissed for the want of prosecution. These two sureties after that applied to the court to set aside the default and to permit them to prosecute the action. That order was made and they proceeded from that time with the prosecution of the suit. It finally reached the Court of Appeals, where it was held that the plaintiff was not entitled to recover, and a judgment for the costs was recovered in the action.

The plaintiff was then insolvent, and this motion was made to require these two sureties to pay the costs which had been recovered under the authority of section 3247 of the Code of Civil Procedure. But the motion was denied for the reason that the cause of action had not been transferred to them and they did not become beneficially interested therein. And that appears, by what had taken place, to have been their situation. No transfer of the cause of action or any interest in it was made to them. They did not become beneficially interested in it in any form, nor did it, by transfer or otherwise, become their property. And it is only when the action may be carried on by a party sustaining one of these relations to it that this section of the Code has subjected him or them to liability for the costs. By no fair construction of the language of any part of the section can it be held to include the case of these sureties. What they did in the way of prosecuting the action was to protect themselves against liability on their undertaking, and not to secure any advantage or interest whatever in the recovery.

The remedy of the defendants, if they are entitled to recover these costs from the sureties in the undertaking, must, therefore, be by an action upon that instrument. It was given in compliance with section 559 of the Code of Civil Procedure, and it bound these sureties, if the defendants should recover judgment, to the effect that the plaintiff would pay all costs which might be awarded to the defendants. And if the plaintiff shall fail to pay, as it is probable it may, because of its insolvency, then, according to this section, the defendants may have an ample remedy against the sureties upon the undertaking. That is the provision that has been made in their favor, and it is under that, if they can secure indemnity at all, that they must proceed for the recovery of these costs.

The order, therefore, was right and it should be affirmed, with ten dollars costs and the disbursements.

VAN BRUNT, P. J., concurred.

BRADY, J. (dissenting):

An order of arrest appears to have been granted in this case, and Theodore Hellman and Emel Carlebach were the sureties on the undertaking given on obtaining the order.

On March 24, 1885, the complaint was dismissed on the default of the plaintiff to appear, and judgment was taken against it in April following. In November, 1885, proceedings were commenced by the sureties to set aside the default, the attorney representing them, and who made the application, affirming that he was acquainted with the facts in the case, and verily believed it could be successfully prosecuted. The result was an order that the motion be so far granted as to permit the sureties to try the issue raised by the pleadings upon certain conditions. Messrs. Seligman were, by the order, substituted for the plaintiff's attorney, and they noticed the cause for trial as attorneys for the plaintiff and sureties. The trial resulted in a judgment for the plaintiff, which, on appeal, was reversed by the General Term and a new trial ordered; and the respondents having appealed to the Court of Appeals by their attorneys, judgment absolute was directed in favor of the defendants, which was duly made the judgment of this court, and the costs taxed at \$354.59, being those which accrued from the time of the order granting the sureties leave to try the issue. Upon these facts the defendants made an application for an order directing the sureties to pay the costs of this action, and that an execution should issue against them on the judgment for costs just mentioned.

The learned justice before whom the motion was argued thought that, under section 3247 of the Code, the motion could not be granted. His view was that the sureties were neither plaintiffs nor transferees, and that the action was not brought or continued by any other person beneficially interested therein. It is true that the sureties were not original parties. It is also true that the cause of action, if any existed, was not transferred to them; but it seems to be an erroneous view that they were not beneficially interested in the cause of action. The learned justice said, in the course of his

opinion, that the plaintiff commenced the action for its own benefit and that the sureties would receive no advantage if the plaintiff had succeeded. This is an error. If the plaintiff had succeeded, the plaintiff being insolvent, they would have been protected by the judgment in its favor; and it was with that design the application was made when they applied for leave to prosecute it. As before suggested, it was stated by one of the attorneys for the sureties that he was acquainted with the facts of the case and verily believed it could be legally prosecuted.

There is little room for doubt that, if the action had been successful, the sureties, on a proper application, would have been protected in reference to any responsibility assumed by them by an appropriation of so much of the judgment as was necessary for that purpose. They were beneficially interested, therefore, in the prosecution of the action, and being beneficially interested were clearly liable for the costs which accrued from the time they took charge of and continued the controversy.

In *Ward v. Roy* (69 N. Y., 96) it was decided that in an action brought in the name of another by an assignee of any right of action, or by any person beneficially interested in the recovery in such action, such assignee or person would be liable for the costs. And it was then said, resting upon authority, that when an action has been virtually carried on by a creditor in the name of the receiver, he has been held liable, and justly so. In this case the plaintiff appears to have suffered a default, and the sureties, apparently in hostility to its act and alleging that it was insolvent, made application for leave to prosecute, and on an assertion that success could be attained. Section 3247 of the Code expressly provides that where the action is brought in the name of another by a transferee of the cause of action or by any other person who is beneficially interested, he should be liable for the costs that may be awarded against the plaintiff in name. And this was clearly intended to include the person who, after the cause of action was commenced and was substantially abandoned by the plaintiff, interposes as a substitute insisting upon the validity of the cause of action set forth in the complaint. And it is equally clear that in any action marked by such circumstances as have been disclosed affecting this case, the

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sureties are, for the purposes of the action or its continuance, to be justly and properly regarded as beneficially interested. If this be not so, then there is no person from whom the costs can be collected, because it is manifest that the plaintiff had nothing whatever to do with the proceedings which originated with and were conducted by the sureties. No such construction as this should be put upon section 3247 of the Code unless it was absolutely compulsory, inasmuch as it would cause injustice by depriving the successful party of the costs awarded and which were intended should be paid by the unsuccessful litigant.

For these reasons the order appealed from should be reversed, with ten dollars costs, and the motion granted.

Order affirmed, with ten dollars costs and disbursements.

THE NATIONAL BROADWAY BANK, RESPONDENT, v. DAVID G. YUENGLING, JR., APPELLANT, AND OTHERS.

Defect of parties defendant.

In an action brought by a judgment-creditor to set aside certain conveyances made by a limited copartnership to a corporation, and to have a certain mortgage, which had been executed by the corporation to the Farmers' Loan and Trust Company, as trustee, adjudged fraudulent, it appeared that the transfer and mortgage thus attacked were made under an agreement between the limited copartnership and a corporation, and one of the members of the copartnership, individually, and certain creditors of such parties, and three trustees, by which it was provided that a new corporation, to be known as the David G. Yuengling, Jr., Brewing Company, should be organized, to which the property of the limited copartnership, and of the individual member thereof, should be transferred, in consideration of which it should assume payment of all indebtedness owing to the creditors of the firm, and of the individual member thereof, and of the New York and Staten Island Brewing Company, who should sign such agreement.

The complaint alleged that the agreement was carried out, but that the conveyances and transfers thereunder were made by the copartnership and the individual member thereof, and were accepted by the David G. Yuengling, Jr., Brewing Company with the intent and for the purpose of hindering, delaying and defrauding their creditors.

Neither the New York and Staten Island Brewing Company, nor any of the creditors who signed the agreement, were made parties to the action, to the com-

plaint in which the defendant Yuengling demurred on the ground that they were necessary parties to the action.

Held, that the demurrer should be sustained.

That as the complaint attacked not merely the conveyances and transfers of the judgment-debtor's property, which were made pursuant to the agreement, but assailed the agreement itself, and further alleged that all the parties to the agreement had notice at the time it was executed of the intention to hinder, delay and defraud creditors, and asked that the said agreement be declared null and void as against the plaintiff, that the court could not properly adjudicate that the New York and Staten Island, Brewing Company, and the creditors signing this agreement, entered into the same knowing it to be fraudulent without affording them an opportunity to be heard on that subject.

That these creditors were not represented in this respect by the Farmers' Loan and Trust Company, which was made a party defendant to the action, as that corporation was not a trustee for these creditors as to any rights they had acquired directly under the agreement, nor the representative of the creditors in entering into the agreement.

APPEAL by the defendant David G. Yuengling, Jr., from a judgment of the Supreme Court, overruling a demurrer interposed by said defendant to the plaintiff's complaint, which judgment was entered in the office of the clerk of the county of New York on the 12th day of April, 1889.

The demurrer was interposed on the ground that there was a defect of parties defendant.

Moses Weinman, for the appellant.

Charles A. Deshon, for the respondent.

BAETLETT, J. :

The National Broadway Bank is a judgment-creditor of the defendant David G. Yuengling, Jr., having recovered twenty judgments against him as the general partner in a limited copartnership doing business under the firm name and style of D. G. Yuengling, Jr., the special partner being the defendant William Belden. The present suit is brought by the bank to set aside certain conveyances, transfers and assignments made by this firm of D. G. Yuengling, Jr., and by the defendants Yuengling and Belden to a corporation known as the D. G. Yuengling, Jr. Brewing Company, and also to have certain mortgages adjudged fraudulent which had been executed by the said corporation to the Farmers' Loan and Trust Company, as trustee, in so far as the same cover property against which the

plaintiff's claims would be enforceable if still in the hands of the limited partnership or of the members of that firm.

The transfer and mortgage thus attacked were made under and pursuant to an agreement between David G. Yuengling, Jr., and William Belden, composing the firm already mentioned; David G. Yuengling, Jr., individually; The New York and Staten Island Brewing Company; such creditors of the three parties already mentioned as actually signed the instrument; and Conrad N. Jordan, George M. Hard and Octavius D. Baldwin as trustees. This agreement recited that the firm, the defendant Yuengling, individually, and the New York and Staten Island Brewing Company had incurred obligations which they were unable to meet at maturity, but that they claimed to have assets, respectively, more than sufficient to discharge their respective obligations if the same were properly administered in connection with the brewing business of said firm and company. To this end it went on to provide that the defendants Yuengling and Belden should procure the formation of a corporation to be known as the D. G. Yuengling, Jr., Brewing Company, with a capital stock of two millions, to which should be transferred the property of the limited copartnership and of the defendant Yuengling individually, in return for which the corporation thus organized should issue its capital stock to the firm, and would assume payment, by means of its mortgage bonds, of all the indebtedness owing to such creditors of the firm and of the defendant Yuengling individually, and of the New York and Staten Island Brewing Company, as should sign the agreement, such indebtedness not to exceed \$1,500,000 in the aggregate. It further provided that the new corporation should execute a mortgage to the Farmers' Loan and Trust Company upon the property thus transferred to it, to secure payment of the bonds which were to be issued to the creditors who signed the instrument; that the limited copartnership should assign to Messrs. Jordan, Hard and Baldwin, as trustees, all the capital stock in the new corporation to be held by them as security for the payment of the mortgage bonds, and the copartnership and the New York and Staten Island Brewing Company should also procure all the capital stock of the latter corporation to be assigned to the same trustees as like security; and that the creditors of the firm and of the defendant Yuengling individually, and of the New York and

Staten Island Brewing Company who signed, should accept the mortgage bonds of the new corporation in full release, satisfaction and discharge of their several claims. The complaint alleges, in substance, that this agreement was carried out, but that the conveyances and transfers thereunder were made by the defendant Yuengling and his firm and accepted by the D. G. Yuengling, Jr., Brewing Company, with the intent and for the purpose of hindering, delaying and defrauding their creditors. The New York and Staten Island Brewing Company was not made a defendant in the present suit, nor was any one of the creditors who signed the agreement, and the defendant Yuengling demurred to the complaint, on the ground that both the brewing company and these creditors were necessary parties to the action. His demurrer was overruled at the Special Term and he has appealed to this court.

We think the demurrer ought to have been sustained. The complaint does not merely attack the transfers and conveyances of the judgment-debtors' property which were made pursuant to the agreement that has been mentioned, but it assails the agreement itself. In the fifth subdivision of the complaint is an express averment that "the said agreement was made by the said firm of D. G. Yuengling, Jr., and the said David G. Yuengling, Jr., with intent to hinder, delay and defraud their creditors, and among them this plaintiff;" and further, that all the parties to the agreement had notice at the time it was executed of such intent to hinder, delay and defraud. And in the demand for judgment, the first prayer for relief is that the said agreement of October 22, 1887, be declared in all respects null and void as against the plaintiff. The averments of the complaint, as already set forth, suffice to show the existence of an interest on the part of the New York and Staten Island Brewing Company and the signing creditors, in opposition to any judicial action which might invalidate the agreement even as to a third party, like the present plaintiff; and we do not see how the court could properly adjudicate that this corporation and these creditors entered into the agreement knowing it to be fraudulent, as the complaint charges that they did, without affording them an opportunity to be heard on that subject. They are parties to the agreement and they must be parties to any suit in which the agreement is annulled.

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A different question would be presented if the plaintiff had made no reference in his complaint to the agreement; but had attacked only the subsequent transfers and conveyances.

It was the opinion of the learned judge at Special Term that the creditors were sufficiently represented by the Farmers' Loan and Trust Company, which has been made a defendant. That corporation, however, is not a trustee for these creditors as to any rights which they have acquired directly under the agreement; nor does it appear to have been in any sense the representative of the creditors in entering into the agreement. It is merely their trustee under the subsequent mortgage, and this relation does not make it an adequate representative of the creditors in an action to set the agreement aside.

The interlocutory judgment should be reversed, with costs, but with leave to the plaintiff to amend the summons and complaint upon the payment of such costs.

BARRETT, J., concurred; VAN BRUNT, P. J., concurred in result.

Judgment reversed and demurrer sustained, with costs, and with leave to the plaintiff to bring in other defendants, if so advised, and to amend summons and complaint upon paying costs of the court below and of the appeal.

ELIZUR V. FOOTE, APPELLANT, v. THE MANHATTAN
RAILWAY COMPANY AND ANOTHER, RESPONDENTS.

Reservation of all claim for damages, accrued and to arise to the land conveyed, resulting from the operation of an elevated railroad — what owner is affected thereby.

One Lathrop, in conveying a piece of property in the city of New York on West Fifty-third street, in front of which an elevated railroad had been constructed, by an independent and unrecorded agreement reserved "all right claim and demand heretofore accrued or arising, or which may hereafter arise or accrue to either of the parties to this agreement, against any and every corporations and corporation, person and persons, for or by reason of the erection and building and maintaining of the elevated railroad as at present constructed in Fifty-third street, in front of the premises above described," and the right "to sue for, collect, compromise, compound and receive to his own use, and release and discharge, any and every such claim and demand now existing and accrued, or

hereafter to arise and accrue, against any corporation or corporations, person or persons, for such elevated railroad, and the using and running of the same."

Held, that as the instrument in which this reservation was contained was unrecorded, a purchaser from Lathrop's grantees was not bound thereby.

Seemle, that this was not a reservation of an easement, but simply of the claims for damages which had been sustained by the grantor by reason of the continuous trespasses of the elevated railroad while he was owner of the property, and also of the claims which might thereafter accrue to his grantees for such damages as they should sustain by reason of like trespasses during their ownership.

That the instrument containing these reservations was a mere personal contract, binding only on the parties thereto, the grantor and grantees, and that a purchaser from such grantees was entitled to bring an action to restrain the railroad company from operating its railroad in front of the premises, because of a continuous invasion of the plaintiff's easement in the street, notwithstanding the fact that the railroad company had obtained from the grantor, Lathrop, a conveyance of his rights and such easements as were affected by the operation of its road.

That the easements in question being appurtenant to the land and incident to its use, Lathrop, the grantor, could not reserve to himself the right to restrain their invasion after he had ceased to own the property.

APPEAL by the plaintiff Elizur V. Foote from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 10th day of February, 1890, dismissing the plaintiff's complaint after a trial at the New York Special Term.

L. C. Dessar and Joseph B. Reilly, for the appellant.

Julien T. Davies and E. C. James, for the respondents.

BARRETT, J. :

This is an action to restrain the defendants from operating their elevated railroad in front of the plaintiff's premises, No. 104 West Fifty-third street, in this city, because of a continuous invasion of the plaintiff's easements in that street. The complaint was dismissed upon the ground that the plaintiff had no title to such of these easements as are occupied by the defendants for the purpose of their railroad. The plaintiff purchased the property in June, 1885, from James B. Gillie and Alexander Walker, receiving a full covenant warranty deed. In this deed the premises were properly described, and such description is followed by the usual phrase "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining." This deed unquestionably carried with it the easements in question. Mr. Hilliard,

in his work on Real Property ([3d ed.], vol. 2, p. 356) says: "An easement appurtenant to land passes with the land though the deed neither mentions the easement nor privileges and appurtenances generally, unless it be expressly reserved by the deed or by another made at the same time."

And in *Huttenmeier v. Albro* (18 N. Y., 51), STRONG, J., observed: "It is a general rule that, upon a conveyance of land, whatever is in use for it, as an incident or appurtenance, passes with it."

The easements in the case at bar were appurtenant and appendant to the estate conveyed. Therefore, they ran with the land and passed by the deed of conveyance. (*Hills v. Miller*, 3 Paige, 254; *Manderbach v. Bethany Orphans' Home*, 1 Cent. Rep. [Pa.], 402; *Kuecker v. Voltz*, 110 Ill., 264.) The defendants claim to have purchased so much of these easements as are occupied by them for the purposes of their railroad. The purchase, however, was from a former owner of the land (Mr. Lathrop), and was made long after the plaintiff acquired title. Mr. Lathrop conveyed the premises in question to the plaintiff's grantors (Messrs. Gillie and Walker) by a full covenant warranty deed containing the same description and the same phrase respecting appurtenances which we find in the plaintiff's deed. It seems, however, that Mr. Lathrop, by an independent agreement with Messrs. Gillie and Walker, reserved certain rights, claims and demands against these defendants, and it was because of this reservation that he claimed the right to sell these easements to them, even after Messrs. Gillie and Walker had conveyed to the plaintiff. The reservation signed and acknowledged by Gillie and Walker was in these words:

"The party of the second part having agreed to convey to the party of the first part the premises on the southerly side of West Fifty-third street, in the city of New York, 25 feet in width by one hundred feet in depth, one hundred feet easterly of Sixth avenue. Now, it is mutually agreed between the parties *that all right and claim and demand* heretofore accrued or arisen, or which may hereafter arise or accrue, to either of the parties to this agreement *against any and every corporations and corporation, person and persons, for, or by reason of the erection and building and maintaining of the elevated railroad, as at present constructed in Fifty-third street, in front of the premises above described, on*

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West Fifty-third street, and the running and using of the same shall belong to, and are hereby retained by and reserved and granted to William J. Lathrop, Jr., and his legal representatives and assigns, and are hereby excluded and excepted from any and every grant and conveyance of said premises, or any part thereof, with full liberty and power and authority to said Lathrop *to sue for, collect, compromise, compound and receive to his own use, and release and discharge any and every such claim and demand now existing and accrued, or hereafter to arise and accrue against any corporation or corporations, person or persons, for such elevated railroad, and the using and running of the same.*"

This was not a reservation of the easement or of any part of it. It was simply a reservation of Mr. Lathrop's rights, claims and demands against these corporations for the damages which he had sustained by reason of their continuous trespasses while he was the owner of the property; a reservation also of the rights, claims and demands which might thereafter accrue to Messrs. Gillie and Walker for such damages as they should sustain by reason of like trespasses during their ownership. And these reservations were a mere personal contract, binding only on Gillie and Walker.

The easements in question being appendant to the land and incidents to its use, Mr. Lathrop could not reserve to himself the right to restrain their invasion after he had ceased to own the property. The right to enjoin the continuous deprivation of such incidents can only be possessed and enforced by the owner of the fee. He alone can be interested in maintaining free access to his premises, and in defending the incidental enjoyment of light and air.

But even if these easements could be and were reserved, the plaintiff purchased from Gillie and Walker without notice of such reservation. The instrument under which such reservation is claimed was not recorded, and the plaintiff was certainly not put upon inquiry as to an unrecorded document limiting the estate granted in a recorded deed. The only inquiry put upon the plaintiff was as to the rights of the defendants. If they had purchased the easements from some one authorized to sell them before the plaintiff acquired his title, he would have taken subject to the rights thus secured. (*Mitchell v. Metropolitan Elevated Railroad*

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Company, 56 Hun, 543.) But it would be a strange doctrine that would require a purchaser to look up former owners of land to see whether they have privately reserved easements which are fully covered by their recorded deeds.

The plaintiff made out a proper case for the usual relief in this class of actions, and the judgment should, therefore, be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., and BARTLETT, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,
v. GEORGE FRINDEL, APPELLANT.

Evidence — unsworn statement of a child — quarrelsome character of a complainant against one indicted for an assault.

It is not proper or permissible on a criminal trial, where a child of eight years of age is called as a witness, who shows from his testimony that he has no apprehension of the nature of an oath, to permit him to testify without being sworn, and accept the unsworn statement of the witness for what it is worth.

On the trial of a prisoner charged with having committed an assault in the second degree, the quarrelsome character of the complainant cannot be shown by proof of specific acts on his part, nor is evidence as to his general reputation in that respect admissible, where it is not claimed by the prisoner that the act complained of was committed in self-defense.

APPEAL by the defendant George Frindel from a judgment of conviction of an assault in the second degree, entered in the office of the clerk of the county of New York on the 27th day of February, 1890.

The defendant was indicted for assault in the first degree, the indictment charging that he feloniously made an assault upon the body of one Michael Buhner with a certain knife, and did willfully and feloniously strike and cut the said Michael Buhner with intent to kill him.

A. Steckler, for the appellant.

M. Semple, for the respondent.

VAN BRUNT, P. J.:

This appeal presents for review the question as to the propriety of the rulings of the court in excluding evidence offered by the defendant of the complainant's character for quarrelsomeness.

This evidence was of two classes: One, an attempt to prove specific acts, and the other to establish the complainant's general reputation in that respect. It is not necessary to multiply authorities to show that evidence of specific acts is not admissible. (*Thomas v. People*, 67 N. Y., 218.) Neither was the evidence, as to general reputation, admissible in view of the nature of the defense, because it was not at all claimed by the prisoner that the act was committed in self-defense. Upon the contrary, he testified that the complainant ran into the knife himself, and that the knife was not taken out for any purposes of self-defense, but simply to scare the complainant. This seems to bring the case within the principle of *Abbott v. People* (86 N. Y., 470), in which it is held that testimony of a quarrelsome disposition is not admissible where, under the circumstances, there is no ground for claiming that the act for which the prisoner is being tried was committed in self-defense.

There is another reason why no error was committed in the exclusion of this testimony. At the time it was offered no evidence whatever had been given of an assault by the complainant upon the defendant, and the judge in excluding the testimony expressly stated that he excluded it at that stage of the case, and after the testimony of the defendant of an assault by the complainant, no offer of the testimony was made.

Another point is raised that the counsel for the defendant, after the people had rested their case, asked the court to take from the jury the consideration of the first count in the indictment which charged assault in the first degree. This was refused and the defendant excepted. The prisoner, however, does not seem to have been in any way injured by this ruling, because he was not found guilty of assault in the first, but in the second degree. It does not appear that the jury were influenced by it, nor that he was damaged thereby.

Another point raised is that a child of eight years called as a witness for the defendant, who showed from his testimony that he had no apprehension of the nature of an oath, was not permitted to

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testify. It is claimed that it is a well known practice in criminal trials, when such a witness is called by either party, to take the unsworn statement of the witness for what it is worth. With all due respect to the learned counsel, we are not aware of any such rule or any such practice.

The law requires the testimony of witnesses to be given under the sanctity of an oath; and where a child is of such tender years as not to be able to comprehend the nature of an oath it seems to us that the safeguards which the law has placed around human testimony would be entirely overthrown, were its statements permitted to be given.

There does not appear to be any error which calls for a reversal of the judgment, and it should be affirmed.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

**RALPH H. WHITE AND HENRY A. BELCHER, PLAINTIFFS, v.
SAMUEL EISEMAN AND MOSES L. EISEMAN, DEFEND-
ANTS, IMPEADED, ETC.**

Limited partnership — money paid in by special partners by a check, not cashed when the affidavit and certificate were made — liability of the special partners.

Where an affidavit and a certificate, made under section 8 of title 1 of chapter 4 of part 2 of the Revised Statutes (1 R. S., 765), relating to limited partnerships, states that \$10,000 contributed by two special partners, named therein, to the common stock, has been actually and in good faith paid in cash, and it appears that, in fact, no cash payment had been made by the special partners at the time the affidavit was verified, but a check for \$10,000 had been drawn on that day by such special partners, which was certified on the following day, and was deposited to the credit of the partnership on the next day thereafter, on the afternoon of which latter day the certificate and affidavit were filed and recorded in the proper county clerk's office, and that the next day the check was paid in due course of business to the bank in which it had been deposited.

Held, that the special partners were liable for the debts of the partnership. (BARRETT, J., dissenting.)

That the truth of the affidavit was to be determined at the date at which it was sworn to, and not as of the date at which it was filed in the county clerk's office, and that the affidavit was, therefore, false.

EXCEPTIONS ordered to be heard at the General Term in the first instance, after a trial at the New York Circuit on October 15, 1889, at which a verdict was directed in favor of the plaintiffs for \$1,463.

The action was brought to recover from the defendants, who were special partners in the firm of Spencer & Perkins, a demand existing in favor of the plaintiffs against that firm, on the ground that the defendants were liable as general partners.

The complaint alleged, among other things, "that the amount of capital stated in the said certificate and affidavit to have been paid in cash by the defendants, Samuel Eiseman and Moses L. Eiseman, had not, either at the time of the execution or filing of the said certificate and affidavit, been paid in cash, and that such certificate and affidavit are false."

Charles Austin McMahon, for the plaintiffs.

A. Blumenstiel, for the defendants.

BARTLETT, J. :

Section 7 of the title of the Revised Statutes relating to limited partnerships (1 R. S., 765), requires that at the time of filing the original certificate an affidavit of one or more of the general partners shall also be filed in the office of the county clerk, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash.

The next section (§ 8) is in the following words: "No such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged, filed and recorded, nor until an affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership, shall be liable for all the engagements thereof, as general partners."

The question in the present case is whether the defendants Eiseman are liable as general partners in the firm of Spencer & Perkins by reason of the fact that a false statement was made in the statutory affidavit. The affidavit was made by Sidney S. Spencer, one of the general partners in the firm, and was sworn to in the county of Rensselaer on the 3d of August, 1886. The certificate,

which appears to have been executed and acknowledged by all the partners on the same day, specified \$10,000 as the sum contributed by the special partners, Samuel Eiseman and Moses L. Eiseman, to the common stock. The affidavit stated "that the sum specified in said certificate to have been contributed by the special partners to the common stock has been actually and in good faith paid in cash." As a matter of fact, however, no cash payment of the contribution of the special partners had actually been made at the time this affidavit was verified, nor was any cash payment thereof actually made at any time on the 3d day of August, 1886. A check for \$10,000 on the Pacific Bank, payable to the order of Spencer & Perkins, was drawn by the defendants in the city of New York on August 3, 1886, and delivered to Sidney S. Spencer, the general partner who made the affidavit. The check was uncertified, but was certified on the following day, the fourth, and was deposited to the credit of the partnership a day later, on the fifth, in the city of Troy, at two o'clock in the afternoon. The certificate and affidavit were filed and recorded in the office of the county clerk of Rensselaer county on the same afternoon at a quarter to five o'clock. The check was paid in the due course of business on the 6th of August, 1886, to the Troy Bank in which it had been deposited.

Upon these facts the plaintiffs insist that the defendants Eiseman are liable as general partners, because, at the time the affidavit of the general partner was made it was not true, as therein stated, that the contribution of the special partners had been paid in cash; while the defendants contend that, inasmuch as the check had been certified and deposited in the bank account of the firm before the certificate and affidavit were filed, the statement contained in the affidavit must be regarded as true, because the affidavit is to be deemed to speak, not from the time when it was verified, but from the time when it was placed on file in the office of the county clerk.

The defendants, in support of their position, cite the various decisions holding that a substantial compliance with the terms of the statute concerning limited partnerships is all that will be insisted upon by the courts; that mere defects of form may be overlooked and disregarded; and that the provisions of the act should not be too strictly construed. There is no occasion to question the correctness of any of these propositions in the slightest degree in the case

before us. Here, if there has been any failure to comply with the requirements of the statute at all, it is a failure in a matter of substance. The truthfulness of the statutory affidavit is made, by the very terms of the law itself, essential to the valid constitution of a limited partnership, so that the only test which it is necessary to apply is a reference to the facts to ascertain whether they accord with the statement in the affidavit. In the present case it is plain that they do not, if the affidavit is to be construed as speaking with reference to the existing state of things at the time when the general partner swore to it. On that day there had been no act by or in behalf of the special partners which amounted to a completed cash payment of their contribution to the capital on any theory. The defendants cite *Durant v. Abendroth* (69 N. Y., 148) and the *Metropolitan Bank v. Sirrett* (97 id., 325) as authorities to the effect that the giving of a certified check is equivalent to a payment in cash; but whether that be so or not, no one pretends that the giving of an uncertified check by the special partners to the general partners constitutes the cash payment which the statute prescribes. The question upon which the case at bar, therefore, turns is simply this: Is the truth of the statement contained in the affidavit to be determined as of the time when the affidavit was filed with the county clerk, or with reference to the time when the affidavit was actually verified by the general partner who made it?

So far as the certificate is concerned, it has been held to be sufficient that it shall be true at the time of filing and recording it. (*Ropes v. Colgate*, 17 Abb. N. C., 136.) It may well be that this unverified instrument can properly be signed before the events of which it is intended to be evidence have actually come to pass, so long as the signers are actuated by the intent that it shall not be used in any manner until the statements which it contains actually accord with the facts. Under such circumstances, until the certificate is placed in the hands of the county clerk to be filed and recorded, it is like a deed in escrow. But I do not see how any such view can possibly be taken of the affidavit. An affidavit must be true when it is made or it can never be true at all. The subsequent occurrence of the events therein stated to have happened cannot make the statement true that they had already happened at the time the affiant swore to it. In other words, affidavits cannot be made

in escrow, because the affiant hopes or believes that what he swears to will afterwards come true. To tolerate or sanction the doctrine that an affidavit speaks only from the time when it is used, instead of from the time when it is made, would be to encourage careless swearing and perjury.

I see no room for doubt in this case that the statement contained in the affidavit of the general partner was false, and, therefore, rendered the special partners liable for the engagements of the firm. It is my opinion, therefore, that the exceptions in behalf of the defendants Eiseman should be overruled, and that the plaintiff should have judgment upon the verdict.

VAN BRUNT, P. J. :

I concur in the conclusion reached by Mr. Justice BARTLETT in this case. The statute in respect to the formation of limited partnerships exempts the special partner from the ordinary personal liability of a partner if certain requirements of the statute are complied with, one of which is the making and filing of an affidavit that the special capital has been actually paid in cash ; now, as I understand it, an affidavit false when made always remains false, and the subsequent happening of the event sworn to does not make it true.

An affidavit cannot be made and delivered to be held in escrow, to become an affidavit if the events sworn to as having taken place, but which have not, in fact, happened, do at some future time occur, otherwise to be null and void. The requirements of the statute are simple enough and easily followed. If the special partner thinks they are otherwise, he need not embark in the adventure. The hardships referred to by Mr. Justice BARRETT seem to me to be more imaginary than real ; and if following the plain requirements of the statute is deemed impossible, nobody is bound to incur any risk, as no one is required to seek the shelter of the statute.

BARRETT, J. (dissenting) :

I am unable to concur with my brother BARTLETT in this case. It seems to me that the strict letter of the statute should not be applied against a special partner where every essential has been complied with. Here the special partner's certified check for the amount of his contribution to the capital was actually on deposit in

the firm's bank at the time when the certificate and affidavit were filed. Every statement contained in these papers was true at the moment of such filing. If this affidavit, just as it stood, *verbatim et literatim*, had been reverified a moment before the filing, it is not pretended that the special partner would have been liable. A special partner cannot make this affidavit. That must be done by one or more of the general partners. If the affidavit is false, the special partner is nevertheless liable. Thus the burden is put upon him to see to it that a truthful affidavit is filed. If here the special partner had read the affidavit at the moment of filing, he would have seen that the exact truth was stated therein. Yet he is sought to be held because he did not happen to observe the precise date of the *jurat*. Upon this construction of the statute, even lynx-eyed observation of the date of the *jurat* would not always avail the special partner. For, as a matter of fact, the affidavit might have been sworn to upon the very day when the cash was actually paid in, *but yet a few hours before such payment*. Such a claim, if allowed, would sacrifice substance to form, and if pursued with regard to the statute generally, would ruin innocent people upon pure technicalities. In my judgment, the false statement contemplated by the statute, whether made in the certificate or in the affidavit, is a statement which, when it meets the eye of the public, is in any particular misleading. "The object of the statute," said FOLGER, J., in *Van Ingen v. Whitman* (62 N. Y., 520), "is, by the payment into the capital of a specified sum in cash, to give reasonable security to the portion of the public likely to deal with the partnership; and *to insure the payment of that sum, thus, it requires the affidavit that the payment thereof has been thus made before the partnership can start as a limited one. The statement of the amount of the cash payment is required so that the public may gauge thereby the extent of its dealings with the firm. The affidavit is called for that the public may have reliance upon the existence of the fact of payment.*"

That the statute should receive a reasonable construction was held by the Court of Appeals in *President, etc., v. Laimbeer* (108 N. Y., 582). In that case PECKHAM, J., speaking of the plaintiff's contention that the statute must be strictly construed and all its provisions fully

and even technically complied with before exemption from general liability can be claimed, observed :

“Acts providing for the formation of a limited partnership should receive a reasonable construction, not such as to make its formation almost impossible, and not such that where the slightest and most innocent (*and to third persons an entirely harmless*) deviation from the strictest construction that can be given to a statute shall work results to the special partner of possibly a most disastrous and utterly ruinous nature, including liability for enormous debts incurred by the general partners where the credit given was not in the least based upon any assumed liability of the special partner greater than the capital he had contributed.”

In *Durant v. Abendroth* (69 N. Y., 148) the certificate and affidavit were actually filed on the 23d of December, 1870, and the partnership did not commence until the first of the following January, nor was the capital actually paid in until the second of January. Both the certificate and affidavit, therefore, were untrue at the time when they were filed, but even with reference to that state of facts, PECKHAM, J., in the *Laimbeer Case* (*supra*), said :

“I think it was a very stern and technical application of the statute, because, confessedly, before one particle of business was transacted by the firm, and *on the earliest possible day after* the commencement of the term of partnership at which it could be done, *the check was paid and the cash contributed* by the special partner to the general fund. *It does not seem to me as if the principle of that case should be extended.*”

The *Laimbeer Case* seems to be a distinct authority against a technical construction of the statute, especially in non-essentials, and in favor of the sufficiency of a substantial compliance with its terms.

I see no distinction in principle between the present case and *Ropes v. Colgate* (17 Abb. N. C., 136). In that case Justice BROWN said that, “What is required of parties desirous of availing themselves of the privileges conferred by the statute in question, is a substantial compliance with its terms. Of what importance is it whether the capital contributed by the special partner is paid in a few minutes before or a few minutes after the certificate is signed, so long as it is paid in good faith before the partnership comes into existence? In my judgment, if, at the moment the partnership is

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formed by the act of filing the certificate, all its statements are true, there is both a substantial and a literal compliance with the statute, and the special partner is not liable to the creditors of the firm."

The statute in this respect makes no distinction between the certificate and the affidavit. If either is false, the specified consequences follow. In one case there is a false statement, in the other a false oath. If either tends to thwart the statute, mislead the public or induce any one to rely upon a fact which does not exist at the moment of filing of the papers, the liability of general partner follows. It is not until that moment that the partnership becomes complete, and it is not until that moment *that the affidavit becomes material*. It is not a question of the criminal law, nor yet of moral obliquity. It is simply a question of a statement placed on file for the inspection and advice of persons about to deal with the firm. What difference can it possibly make to such persons whether the truthful facts placed before them on the files were sworn to on the day of filing or the day before; on the day when the check was cashed or the day before? Where, then, the special capital has been paid in, in cash, prior to the filing of the certificate and affidavit, and these documents so state, everything essential or substantial has been done. To hold a special partner liable under these circumstances is simply to fine him the debts of the firm, not because of his own perjury, but because of an anticipatory statement made by another person, technically inaccurate at the time it was verified, but true when used pursuant to the requirements of the law, and which could not possibly have affected any person who ever had dealings with the firm.

I think the exceptions should be sustained and a new trial ordered.

Exceptions overruled as to defendants Eiseman, and judgment ordered for plaintiffs upon the verdict.

AUGUSTA G. GENET, APPELLANT, v. THE PRESIDENT,
ETC., OF THE DELAWARE AND HUDSON CANAL
COMPANY, RESPONDENTS.

Lease and contract for sale of coal to be mined — right of lessee to make use of any other product than the kind to be paid for under the contract.

In an action based upon an agreement which had been entered into between the plaintiff and the defendant, under which, for each ton of clean and merchantable coal, exclusive of culm or mine waste, to be passed through a mesh of one-half square inch, taken from certain coal lands in the State of Pennsylvania, the defendant was required to pay twelve and one-half cents, the complaint alleged that the defendant in preparing the coal for market used a mesh five-eighths of an inch square instead of half an inch square, in consequence of which ten per cent of all the coal mined, or 80,000 tons, had passed through the five-eighths mesh, which would have gone over the half-inch mesh.

It was also alleged that the defendant had prepared what was known as pea coal, by screening the coal which had passed through the five-eighths mesh over a mesh of seven-sixteenths of an inch.

And, also, that the residue of the coal remaining after the preparation of the pea coal was again screened by the defendant and separated into two grades, buckwheat and birdseye coal, and that 100,000 tons of such coal had been taken and carried away by the defendant.

And, further, that although the defendant had mined and taken away from the land at least 1,200,000 tons of coal, it had paid the plaintiff for less than one-half that amount, and asked for a general accounting for the value of all coal mined. At the time the contract was made all the sizes of coal, called pea, buckwheat and birdseye, were considered worthless, and were included in the waste products of the mine under the name of culm.

Held, that there was no intention on the part of the plaintiff to convey to the defendant any beneficial result of the mining operations, as a gratuity.

That it was the duty of the defendant to pay for all coal mined and taken out, in pursuance of the agreement, exclusive of the coal which possessed no marketable quality.

That while the defendant might not have had a right, under the terms of the agreement, to utilize the culm, yet, having done so, the product became a part of the subject-matter of the contract and gave the plaintiff the right to insist upon compensation therefor.

That, in any event, the defendant had utilized the culm, in which the agreement gave him no rights, which was, in fact, owned by the plaintiff, who thereby acquired a cause of action against the defendant. (VAN BRUNT, P. J., dissenting.)

APPEAL by the plaintiff from a judgment entered in the office of the clerk of the county of New York on the 19th day of October,

1889, after a trial before a referee appointed to hear and determine the issues in the action. The judgment was in favor of the plaintiff and against the defendant for \$4,947.21, and directed that the third cause of action alleged in the complaint be dismissed upon the merits.

The complaint alleged that the plaintiff was the owner in fee, as her separate estate, of about one hundred acres of coal land in Pennsylvania; that the defendant was a corporation duly incorporated by an act of the legislature of the State of New York, engaged in the business of mining coal and transporting the same to be sold in New York and at other places; that an agreement had been entered into by which the defendant leased "all the coal contained in, on or under that certain piece or parcel of land," etc., * * * "to include all the coal that can be economically mined or taken out from the above described premises, together with the right to enter upon and into said lands and to dig and mine and remove said coal through or out of any shafts, slopes or tunnels that they may dig, erect or construct upon the premises, * * * and the said party of the second part agrees to pay for the coal mined and taken out in pursuance of this agreement at the rate of twelve and one-half cents (12½) for every ton of (2,240) twenty-two hundred and forty pounds of clear merchantable coal, exclusive of culm or mine waste, that will pass through a mesh of one-half inch square."

G. C. Genet, for the appellant.

F. E. Smith, for the respondent.

BRADY, J.:

The judgment appealed from is two-fold: First, a money judgment in favor of the plaintiff for \$4,947.21; and, second, a judgment dismissing one cause of action upon the merits. If, upon a consideration of the whole case, therefore, the judgment dismissing the cause of action suggested is erroneous, there must be a new trial without reference to the exceptions relating to other parts of the case.

The basis of the action is an agreement between the parties by which certain coal lands in the State of Pennsylvania were leased to the defendant, one of the terms of which required the defendant to pay twelve and a half cents for each ton of clean and merchantable coal, exclusive of culm or mine waste, to be passed through a mesh of one-half square inch.

The first cause of action, after referring to the agreement mentioned, the working of the mine and the rendering of accounts, alleges that the defendant, in preparing the coal for market, used a mesh five-eighths of an inch square instead of half an inch square as required by the agreement, and that, as a result, ten per cent of all the coal mined, or 30,000 tons, had passed through a five-eighths mesh, which would have gone over a half-inch mesh, and this amount was omitted from the account.

The second cause of action alleges the preparation by the defendant of what is known as pea coal by screening what goes through a five-eighths mesh over a mesh of seven-sixteenths of an inch, and seeks to recover the stipulated royalty on the whole of the pea coal taken from the mine in question, and claimed to amount to 150,000 tons.

The third cause of action alleges that the coal left, after the preparation of the pea coal, is again screened by defendant and separated into two other grades of coal called buckwheat and birds-eye, and that such coal, to the amount of 100,000 tons, had been taken and carried away by the defendant, the value of which was \$35,000, which sum was claimed.

The fourth cause of action was a charge that the defendant had mined and taken from the land in question at least 1,200,000 tons of coal, but had paid plaintiff for less than half that amount, and that the accounts rendered by the defendant were false. The prayer for judgment was for a general accounting for the value of all coal mined; for the value of the small coal that would pass through a half-inch mesh, that is, all pea coal and all buckwheat and birdseye coal; for damages to the amount of \$10,000, caused by recrushing the coal and reducing the same to dust or culm, and for general relief.

In reference to these different sorts of coal the referee found that the various sizes or grades in which anthracite coal is placed upon the market are called lump, steamboat, grate, egg, stove, chestnut, pea, buckwheat and birdseye, and these sizes, with the exception of pea, buckwheat and birdseye, were substantially the same as those in which anthracite coal had been placed upon the market for more than forty years, and that the sizes of coal, now called pea, buckwheat and birdseye were formerly considered worthless, and were included in the other waste products of the mine under the name of

culm; that the size now called pea was first separated from the culm and put on the market about 1857, but did not become one of the sizes commonly dealt in until about 1865, or later, while buckwheat and birdseye have been so separated and sold only since about 1880. As will have been observed, the third cause of action relates to the size just mentioned, and which was dismissed upon the trial.

The question which presents itself *in limine* is whether the dismissal of that cause of action was erroneous or not. The agreement was made on the 28th of March, 1864, and contains the following: "And the said party of the second part agree to pay for the coal mined and taken out, in pursuance of this agreement, at the rate of twelve and a half cents ($12\frac{1}{2}$) for every ton of (2,240) twenty-two hundred and forty pounds of clean merchantable coal, *exclusive of culm or mine waste that will pass through a mesh of one-half inch square.*"

At that time, as found by the referee, the sizes now called pea, buckwheat and birdseye were considered worthless and were included in the other waste products of the mine under the name of culm. It is quite apparent that the language of the agreement, to which particular attention has been called, *exclusive of culm or mine waste*, was adopted with reference to the then supposed worthlessness of that product of the mine. And it is equally evident, from an interpretation of the whole instrument, that there was no intention on the part of the plaintiff to convey to the defendant any beneficial result of mining operations as a gratuity; nor is there any ground for the defendant to claim the right thereunder to appropriate the same to its own advantage without due compensation. The manifest design of the agreement was to authorize the defendant to conduct such mining operations as would develop a marketable article for which a marketable compensation was to be paid. It was thereby made the duty of the defendant to pay for all coal mined and taken out in pursuance of the agreement, *exclusive of culm or mine waste*; so *exclusive* because it was supposed to possess no marketable quality, and, indeed, had none, as already suggested, until 1865, and subsequent to the making of the agreement between the parties.

It makes no difference whether the agreement makes the defendant the absolute owner of the coal, as if by deed in fee simple, or a

lessee with rights and privileges in reference to the mineral found upon or under the surface, inasmuch as the mining of the coal involved the payment for its appropriation of a royalty agreed upon by the parties. It would be absurd to hold that, under such an agreement, no matter how it may be designated in legal parlance, the coal was transferred unqualifiedly, and it is not at all likely that any court of justice will so adjudicate. Whenever coal is taken from the land embraced within the agreement, it must be paid for whether it is the result of a new process with regard to culm or not.

It is true that the defendant, under a strict construction of the agreement, would be under no obligation to utilize the culm, but, having done so, the product became a part of the subject-matter of the contract and gave the plaintiff the right to insist upon such compensation as might be awarded, if the royalty provided for by the agreement had no application. But even if this be not so, the utilization by the defendant of the culm in which he had no property, and as to which the agreement gave it no rights, and which was, in fact, owned by the plaintiff, created an independent cause of action which could be enforced herein, but which was disregarded by the referee, and it is thought erroneously.

The record in this case has been the subject of many examinations with its numerous exceptions and complications, but the recurrent thought has been that the exclusion of the third cause of action was improper, and deliberate consideration of that proposition has led to the conclusion herein stated, a conclusion which renders it entirely unnecessary to consider any of the other exceptions presented on behalf of the plaintiff.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide event.

DANIELS, J., concurred.

VAN BRUNT, P. J.:

I dissent from the conclusions of Mr. Justice BRADY and concurred in by Mr. Justice DANIELS. The coal lands were leased to the defendants for mining purposes. The rents were fixed upon the basis of a payment of twelve and a half cents for every ton of merchantable coal which would pass through a mesh one-half inch

square. The evidence showed that this necessarily excluded buckwheat and birdseye coal. It is evident that all the coal mined by the defendants belonged to them, and if they found, after the execution of the lease, that they could make use of what they previously had been compelled to throw away, I see no basis arising from that fact for a change in the standard by which the rent is to be measured. The parties fixed the method of determining the rent and the court cannot now alter the contract.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN BOULEVARD RAILROAD COMPANY TO ACQUIRE THE RIGHT TO CONSTRUCT AND OPERATE ITS ROAD UPON THAT PART OF THE SOUTHERN BOULEVARD, IN THE CITY OF NEW YORK, WHICH FORMERLY BELONGED TO PAUL SPOFFORD, DECEASED.

Conditions under which land is taken for a highway — cannot be done away with by the legislature to the prejudice of adjoining owners, without compensating them.

By chapter 290 of 1867 the legislature authorized the towns of Morrisania and West Farms to widen, make and extend a highway in said towns, to be called the Southern Boulevard; and further provided that, "except for the purpose of crossing the same, no railway or tram-way shall be laid or constructed thereon, or upon any part thereof, by any persons or corporations whatsoever, without a special act of the legislature of this State for that purpose first had and obtained;" and further provided, that in case such special act should be passed the right should exist in the several owners of land which should be taken for the road, to claim and recover from the person or corporation obtaining authority to construct such railway the full value of all the land taken, to the same extent as if no such road had ever been laid out on said land. Subsequently, by chapter 723 of 1887, the legislature authorized a railroad to be constructed upon this boulevard.

In proceedings taken by said railroad company to acquire the right to lay and operate its road upon the said boulevard, commissioners were appointed, who awarded only nominal damages to the owners.

Held, that the legislature, having authorized the taking of the land for public use, upon certain conditions, could not abolish those conditions and treat the prop-

erty as though no such conditions had been attached to its condemnation when first taken.

That such conditions constituted a contract between the owners and the people, which the legislature had no right to abrogate.

APPEAL by Paul N. Spofford and Joseph L. Spofford, individually and as surviving executors and trustees under the last will and testament of Paul Spofford, deceased, Edward Clarence Spofford and others, from the appraisal and report of the commissioners of appraisal, made in the above-entitled matter and filed with the clerk of the county of New York on the 14th day of May, 1890; and also from an order of the Supreme Court, made at Special Term confirming the said report, which order was entered in said clerk's office on the 15th day of May, 1890.

W. P. Williams, for Paul N. Spofford and another, appellants.

John N. Lewis, for the petitioner, respondent.

VAN BRUNT, P. J. :

In 1867 the legislature passed an act (chap. 290), to authorize the towns of Morrisania and West Farms to widen, make, extend and improve a highway in said towns to be called the Southern boulevard, and by the act commissioners were appointed with power to perform the several acts and duties therein prescribed. Amongst other things it was provided in said act as follows :

Section 24. Said road when constructed shall be kept and maintained for the public use as an avenue and boulevard, and except for the purpose of crossing the same no railway or tramway shall be laid or constructed thereon, or upon any part thereof, by any persons or corporations whatsoever, without a special act of the legislature of this State for that purpose first had and obtained; and in case the legislature of this State shall, at any future time, grant to any person or corporation the right to construct any rail or tramway upon said road or any part thereof, nothing in this act contained shall be construed to affect or cut off the rights of the several owners of lands, which shall be taken for laying out the road hereby authorized, to claim and recover from such person or corporation the full value of all the land taken from such owner or owners for the road hereby authorized to be constructed, to the same extent as if no

such road had ever been laid out on said lands, and without any deduction for any supposed benefit to said lands to arise from the construction of such rail or tramway."

The proposed boulevard was laid out pursuant to the authority of that act, and commissioners of estimate and assessment were appointed for the assessment of damage and benefit, whose report was duly confirmed and the said boulevard duly opened. In the year 1887 the legislature, by chapter 723, amended the act of 1867 by making section 24 of that act read as follows:

"Said road when constructed shall be kept and maintained for the public use as an avenue and boulevard and no railway or tramway shall be laid or constructed thereon except by a railroad company which has been or may hereafter be duly organized under and by virtue of and in conformity with the provisions of chapter two hundred and fifty-two of the Laws of eighteen hundred and eighty-four, and which has heretofore complied or shall comply with all the provisions of said chapter in respect of the consent of owners of property and the local authorities."

The Southern Boulevard Railroad Company, organized under the said act of 1884, began those proceedings to acquire the right to lay and operate its road upon the said boulevard. Commissioners were appointed, who made simply a nominal award; apparently having based their award upon the provisions of section 24, as amended in 1887, and not as originally enacted.

From this award the appellants, who were owners of property taken for the opening of the boulevard, appeal; and the question presented seems to be, whether the legislature, after having authorized the taking for public use of property upon certain conditions, can abolish those conditions and treat the property as though, in the first proceeding, no conditions whatever had been attached to its condemnation.

We think that this cannot be done. The provisions for the protection of the owners of property taken or assessed for the opening of the boulevard constituted a contract between such owners and the people of the State of New York which the legislature had no power by its subsequent action to impair.

Undoubtedly the awards made as compensation for the property taken were affected by the provisions contained in the act of 1867,

whereby, in case (as had frequently been done) the street was to be prostituted to the uses of a private corporation, the owners should receive full indemnification for the taking of their property as though the proceedings for opening it as a highway had never been taken.

This was the offer which the legislature made to the owners of the property. This was the offer which they accepted, and the legislature had no power to recede from this bargain after it had been consummated by the opening of the street in accordance with the terms of the act in question.

It is urged that this construction affirms the proposition that one legislature has the power to bind a subsequent legislature by a provision which would prohibit a new inquiry into the subject-matter and new legislation, a proposition which needs but to be stated to be condemned, and which has been specially repudiated by the court in this department in reference to this very statute of 1867. (*Harlem Bridge, M. and F. R. R. Co. v. Southern Boulevard, etc.*, 41 Hun, 553.)

An examination of the case cited shows that it has no applicability whatever to the question involved upon this appeal. All that was intimated in that case, a point which it was not necessary to decide, was that the legislature could repeal the act of 1867. There is no question but that it could so repeal that act, and if it did so, the lands occupied by the Southern boulevard would at once revert to their owners; but the legislature has no power to repeal that part of the act whereby, as an inducement to the owners of land to permit the improvement, it covenanted for their protection. The legislature authorized the people to take the land under certain conditions and the people cannot hold the land in disregard of those conditions. Neither can this private corporation come in and claim this property in condemnation proceedings without due regard to the conditions under which it was in the first instance devoted to public use.

We think that by the terms of the act of 1867 a contract was entered into between the people of the State and the owners of this property; that after this improvement was made and paid for by the adjacent owners no railroad company should be permitted to seize upon this avenue without compensating the owners for their property so taken.

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We think, therefore, under the circumstances, that the owners of this property were entitled to more than a nominal award and that they were entitled to receive the actual value of the land as though no street had ever been opened.

The order should be reversed and the proceedings sent back to the commissioners for further examination, with costs to the appellants to abide the final event.

BRADY and DANIELS, JJ., concurred.

Order reversed and proceedings sent back to the commissioners for further examination, with costs to the appellants to abide the final event.

GEORGE JOHNSON, RESPONDENT, v. CHARLES R. TYNG,
APPELLANT.

An agreement, terminable by ten days' notice, continues in force for ten days after such notice is given — default therein — waiver.

Under an agreement, entered into by a manufacturer, owning a steel rolling-mill, with a vendor of steel, the latter agreed to furnish crude steel, and the former to manufacture it, at a fixed rate of compensation. The agreement was to continue during the mutual pleasure of the parties, and to terminate only after two months' notice. This agreement was afterwards terminated upon notice, at which time there was \$881.56 due to the plaintiff.

Thereafter the parties entered into an agreement which was to continue for five years, during which the vendor of steel was to have the exclusive sale of the entire product, with a credit of sixty days from the date of each monthly account within which to pay the amount thereof; and in case of his failure to make payment as provided for, it was stated therein that the agreement should, upon ten days' personal notice, be null and void.

This last-mentioned agreement was performed on both sides for about a year, at the end of which time it was claimed by the manufacturer that the vendor had made default in one of his payments, and a notice of ten days terminating the agreement was given by the manufacturer, who immediately stopped work.

In an action brought by the manufacturer to recover a balance due under each of these agreements, it was claimed by the defendant that the plaintiff could not recover the money sued for, because he had failed to perform the contract under which these moneys were earned, and that the breach of the contract had caused damage to the defendant.

Held, that, in view of the negotiations between the parties, which resulted in the making of the second agreement, any defaults which might have taken place

under the first agreement were waived, and that a right of action existed against the defendant for the amount due under the first agreement at the time the second agreement was entered into.

That, under the second agreement, the manufacturer having at once stopped work, instead of waiting until the ten days fixed by the contract had expired, had broken the terms of this agreement.

That as it was necessary, in order that the plaintiff should recover the amount which he claimed under this contract, that he should show that he had performed it, no right of action existed in his favor and he could not recover for the work done prior to its breach.

APPEAL by the defendant Charles R. Tyng from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 19th day of March, 1890, in favor of the plaintiff, after a trial at the New York Circuit before the court without a jury.

T. M. Tyng, for the appellant.

J. C. O'Connor, Jr., for the respondent.

VAN BRUNT, P. J.:

This action was brought to recover certain moneys claimed to be due by defendant to plaintiff. The plaintiff was a manufacturer, working a steel rolling-mill, and the defendant was a vendor of steel.

In 1879 the defendant made an agreement with the father of the plaintiff, by which he agreed to furnish crude steel to the father of the plaintiff, the latter to manufacture it for him at a fixed rate of compensation. The agreement was to continue during the mutual pleasure of the parties and to terminate only after two months' notice of such discontinuance and the completion of all contracts then entered into. In December, 1881, the father of the plaintiff died, and subsequent thereto the defendant entered into an agreement with the plaintiff, who had succeeded to his father's interest in the mill, which had, in the meantime, been removed to Pennsylvania. This agreement was a continuation of the agreement theretofore made between the defendant and plaintiff's father, and provided that the defendant should supply raw material, and the plaintiff was to work it up and defendant was to pay plaintiff at the prices fixed in the agreement, and that the agreement was to terminate on two months' notice. Under this agreement the parties

continued business over two and a half years, until the 16th of July, 1884, when notice was given terminating the same two months thereafter. At this time there was \$331.56 due under this second agreement, and the plaintiff stopped working thereunder.

On the 31st of July, 1884, the parties entered into a third agreement, which provided for its continuance for five years, during which the defendant was to have the exclusive sale of the entire products of the plaintiff's mill, with a credit of sixty days from the date of each monthly account, within which to pay the amount thereof.

It further provided, that in case the defendant should fail to make payment as provided in the agreement, that the agreement should, upon ten days' personal notice, be null and void. This third agreement was performed on both sides for a year after it was made until the 25th of July, 1885; at that time it being claimed by the plaintiff that the defendant had made default in one of his payments, he gave defendant the notice of ten days, terminating the agreement, and immediately stopped work. There was a balance claimed to be due upon this third agreement at this time, and for the balance due under the second agreement, and under this third agreement this action was brought, and recovery was had for the whole amount, and from the judgment thereupon entered this appeal is taken.

The claim of the defendant is that the plaintiff cannot recover the moneys sued for, because he failed to perform the contract under which these moneys were earned, and that the breach of the contract caused the defendant certain damages as alleged in the counter-claim.

It seems to us, in view of the negotiations between these parties which resulted in the making of the third agreement, that whatever defaults may have taken place under the second agreement were waived, and that the plaintiff would have a right of action against the defendant for the amount due under that second agreement at the time at which the third agreement was entered into.

The case, in respect to the claim made under the third agreement, however, is entirely different. By the terms of the third agreement the plaintiff was to have the right to terminate the same in case the defendant should fail to make payment as therein provided

upon ten days' personal notice. And the plaintiff expressly states, in the course of his cross-examination, that the object of requiring the ten days' notice was to enable the defendant to hold on to the agreement for these ten days.

It appears from the uncontradicted evidence in the case that, instead of waiting till the end of the ten days to stop work, at which time the agreement became null and void by its terms, the plaintiff stopped work instantly and refused to go on during the period of these ten days, and thus broke the agreement upon his part. The terms of the agreement did not provide that the agreement should become null and void in case the defendant failed to make payment in accordance with its terms; but it gave the plaintiff the option, in case of such failure, to terminate the agreement by giving ten days' notice, such termination evidently to take place after the expiration of the ten days for which the notice had been given. Therefore, the position of the plaintiff is a breach upon his part of the terms of the agreement under which he claims judgment against the defendant. In order that the plaintiff should recover these various sums of money which he claims, it was necessary for him to show that he had performed the contract on his part, and until he established that proposition no right of action in his favor existed. The plaintiff not only did not establish this proposition, but it was proven that he broke the agreement himself by failure to comply with its terms. This being the condition of the proof, we do not see how the plaintiff can recover for the work done prior to the breach.

It is urged that by the provisions of the agreement the plaintiff was to have a lien upon the termination of the agreement upon all the material which was sent to him by the defendant in case of a breach. But that lien did not exist until the expiration of the ten days after the giving of the notice, and after the agreement had become null and void. The provision is as follows: "It is further agreed that in case the party of the second part shall fail to make payments as above provided, this agreement shall upon ten (10) days personal notice, be null and void, and any sum or sums which may at such time be due the party of the first part, shall be a lien upon any stock or material belonging to the party of the second part, which may then be in the mill." The words "at such time" evidently refer to the time when the agreement shall become null

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and void, namely, ten days after notice. "The material belonging to the party of the second part which may *then* be in the mill." The phrase "*then*" applies clearly to the time when the agreement becomes null and void, as aforesaid on the tenth day after the giving of the notice, otherwise no effect can be given to the requirement of *ten days'* notice.

There is nothing in the agreement going to show that because of the failure of the defendant to pay pursuant to its terms, the plaintiff had a right then to stop. The parties had expressly provided otherwise; they had expressly provided that for ten days after defendant had been in default, he could claim that the plaintiff should perform his part of the contract although the defendant had failed to perform his. The parties having contracted in this manner, the plaintiff cannot be heard now to claim that he should not be bound by the provisions of his contract.

We think, therefore, that the judgment was erroneous and that the same should be reversed and a new trial ordered, with costs to appellant to abide event.

BRADY and DANIELS, JJ., concurred.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

IN THE MATTER OF THE PROBATE OF THE LAST WILL AND
TESTAMENT OF AUGUSTUS ZEREGA, DECEASED.

Surrogate — cannot, even with the consent of all parties in interest, admit to probate the will of a citizen of the State not a resident of his county.

A surrogate has no jurisdiction to admit to probate in his court the will of a citizen of the State who is not a resident of his county.

Although all the parties interested in an estate give their consent to the probate of the will of the deceased by the surrogate of a county in which the deceased did not reside, and although the executors under the will accept letters testamentary based upon it, this does not give jurisdiction to the court.

APPEAL by the petitioners, Francis A. Zerega and others, from an order or decree of the Surrogate's Court of the county of New

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York, entered in the office of the clerk of said county on May 9, 1889, denying the petitioners' application that the decree entered in said office admitting the will of Augustus Zerega to probate be reopened, vacated and set aside, and that a new trial or new hearing be granted.

The question presented by the petitioners related to the residence of the deceased.

A. Gallup, for the petitioners, appellants.

De Witt, Lockman & De Witt, Samuel Huntington and Horace Barnard, for the proponents and respondents.

BRADY, J. :

This application, so far as it charges Mr. Barnard with misrepresentations, is not sustained. The facts and circumstances disclosed and duly considered justify this conclusion. It is not deemed at all necessary to state them in detail.

The proposition that Mr. Zerega, at the time of his death, was a resident of the city of New York, has not been sustained, however, but, on the contrary, has been successfully assailed. He had a temporary abode here, it is true, but it was in a house occupied by his daughter, for whose use it seems to have been purchased at the time of her marriage. He paid for his accommodation therein while he remained in it, which was during the interval between his departure from his residence in Westchester in the fall of the year and the following spring, a mode of life adopted and kept up for many years prior to his death. The testimony of disinterested persons, of his admissions and declarations in regard to his residence, establishes the conclusion that he considered himself to be a resident of Westchester, and so described himself in his will; and this necessarily went hand in hand with his intention to be such a resident and made him such by act and expressed intent. In addition to this he voted and paid taxes there; and when he expressed his wish to sell his residence there, it was coupled with a statement of an object in view, namely, that he might travel, but not to return to a city residence here, and, indeed, not making any reference to it. This indicated a wish to change his mode of life and to be relieved from a local habitation.

When the residence is thus adopted and proclaimed, especially in connection with an existing domicile, it is not necessary to seek the aid of adjudications bearing upon the much distorted questions of residence and domicile and the difference between them for certain purposes, taxation and the like. A man may reside where he chooses, and although by a *quasi* fiction of the law he may be located in different places for public purposes, such as taxation and the like, yet his home he determines for himself; and where that is in this State, his residence, as described for the appropriation of his estate by the legal processes provided by law, is where that is situate. The Code gives no jurisdiction to the surrogate of this county in such a case.

It is true that the parties interested in the estate gave consent to the probate, and that the executors accepted letters testamentary based upon it, but this did not confer jurisdiction, and is, therefore, of no avail. The standing in court of these persons is such that, if the probate could be upheld, it should not be interfered with on this application, whether the motive which induced the application was in good faith or otherwise.

The surrogate proceeded upon papers regular upon their face and containing all the requisite jurisdictional facts under the provisions of the Code (§§ 2474–2476), and the estate could be administered in all respects as well under his authority as that of any other. But the question of jurisdiction is always a factor of great and continuing importance in courts of justice, and its absence may be successfully resorted to as a destructive negation.

The order appealed from must be reversed, but without costs.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Order reversed, without costs.

THOMAS WILLIAMS, AS ADMINISTRATOR, ETC., RESPONDENT, v.
REBECCA GARDINER, APPELLANT

Negligence of a child in whose charge a younger sister is at the time of an accident to the latter — how far it bars the recovery of damages.

In an action brought to recover damages arising from the negligent killing of an infant four years and nine months of age, it appeared that the defendant had a life interest and was in possession of certain premises in Harlem, the only means of access to the privy connected with which was by going out through a door in the second floor to a shed, and from the shed to the yard, by a stairway; that the mother of the deceased had placed her in charge of her sister, who was nine years of age, and who went with the deceased down into the back-yard and then came up the steps. The deceased was behind her sister, who went into the house when the former was two steps from the top of the stairway. The sister returned at once from the house and found that the deceased had fallen down the steps and was killed.

The defendant's counsel asked the court to charge that if the mother selected an older child to accompany the deceased upon the occasion in question, and the one so selected was negligent in caring for the deceased, the plaintiff could not recover, which the court declined to do.

Held, that the court erred in refusing to so charge.

That the deceased was evidently placed in charge of her sister, and the care taken of her by the latter was a proper subject of inquiry, and the question in regard to the negligence of the sister should have been submitted to the jury as requested.

APPEAL by the defendant Rebecca Gardiner from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 17th day of February, 1890; and also from an order denying defendant's motion for a new trial made on the minutes of the court.

The action was tried before the court and a jury at the New York Circuit, at which a verdict was rendered in favor of the plaintiff for the sum of \$2,000.

Artemus H. Holmes, for the appellant.

John D. Townsend, for the respondent.

BRADY, J.:

This action was brought under the statute to recover damages for negligently causing the death of Lillie Williams, the plaintiff's intestate and daughter, aged four years and nine months.

The defendant had a life interest in and was in possession of premises in Harlem. The building was three stories in height, the lower floor being rented for business purposes. The only public means of access to the privy was by going out through a door in the second floor to a shed which was sixteen feet or more from the yard, and from the shed to the yard by a stairway.

On the 26th of January, 1889, the plaintiff's intestate, while returning from the privy in company with her sister, who was nine years old, fell, it would seem, from the stairs mentioned, into the cellar and fractured her skull, death ensuing within a day or two thereafter.

Upon the trial it appeared, among other things, from the testimony of the mother, that she had forbidden the children going into the yard, and for the purpose of securing obedience caused them to go through her room and tried to keep the door locked to prevent their going out, her husband being an invalid and apparently incapable of looking after them. She said, also, "I placed the little one in charge of the other at all times; they were always together; she always looked after the little one." "The other," so-called, was the daughter Lottie Sinclair, a bright and intelligent child, apparently, who said: "Before the accident I and my sister went down into the back-yard and then came up the steps; she was behind me, and I went into the house." And, further: "When I saw her two steps from the top (that is when they were returning) I went into the hall and then out again; I did not then find her two steps from the top; I saw her down in the cellar; when I went in I came right back. She came up the stairs, she was behind me, and when I got to the top I saw her two steps from the top;" showing, it would seem, that the child was in her charge but was abandoned for the moment when within two steps of the top of the stairway, when she fell and was killed. Assuming (which may be done for the purposes of the appeal) that all the legal propositions which the facts and circumstances invoked were properly stated to the jury except the one to which attention is about to be called, the omission to grant that request, embracing, as it did, the proposition suggested, seems to be fatal to the maintenance of the judgment.

The child was not in the immediate care of either of her parents at the time the accident occurred, but was in the custody of her

sister, to whose care she was generally committed by the mother, as we have already seen.

After the delivery of the charge, which was comprehensive, and in which the doctrine of negligence to be applied to the intestate, as well as to the parents, under the circumstances disclosed, was dwelt upon elaborately, the defendant's counsel asked the judge to charge that, if the mother selected an elder child to accompany the deceased upon the occasion in question, and the one so selected was negligent in caring for the deceased, the plaintiff could not recover. It will be remembered that the mother testified she placed the intestate in charge of the other one (that is, Lotta Sinclair) at all times; they were always together; she always looked out for the little one. The object of this request to charge was, no doubt, to invoke for the defendant's benefit the rule, seemingly well established, that if in a case of this kind the parent or the guardian, or person in whose custody the child is placed, is guilty of negligence, there can be no recovery. The person selected as guardian or custodian becomes the *alter ego* of the parent, and upon the one so chosen devolves the proper care and management of the child.

A kindred question was involved in the case of *Ihl v. The Forty-second Street Railroad Company* (47 N. Y., 317), in which a child of three years and two months crossed the avenue, upon which the defendant operated its railroad, in charge of a sister, nine and a half years of age. The court there said: "The defendant relied wholly upon the proposition that the sending of the child across the avenue and track unattended, except by another child so young as the attendant in this case was proved to be, was negligence *per se*;" and, further, that the refusal so to charge was not error, but that it was properly left to the jury to say whether it was negligence to permit the little daughter between nine and ten years of age to take the little boy to the drug store in the way she started to do it; that the competency of the little child to act as attendant of the deceased was matter of judgment, and there was no positive rule by which it could be determined.

The doctrine of that case, as declared by the case of *Kunz v. City of Troy* (104 N. Y., 351), is, that there must be concurrent negligence on the part of the parents or guardians, the court saying: "In the absence of negligence on the part of the parents or guardian

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the doctrine of contributory negligence has no application." The law imposes upon parents and guardians the duty of using reasonable care to protect those incapable of protecting themselves, and if they fail to exercise such care and the infant is thereby brought into danger, and the result is injury from the negligent act of another, their negligence is deemed the negligence of the infant.

Under these circumstances the refusal to charge as requested was erroneous. The intestate was evidently placed in charge of her sister, and the care taken by the latter of the former was a subject of inquiry and should have been submitted to the jury as requested.

For these reasons the judgment must be reversed and a new trial ordered.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

EDWARD F. BROWN, AS ASSIGNEE FOR THE BENEFIT OF THE CREDITORS OF JACOB F. WYCKOFF, RESPONDENT, v. WALTER P. BUTLER, AS ADMINISTRATOR, WITH THE WILL ANNEXED, OF THE ESTATE OF W. I. BUTLER, DECEASED, APPELLANT.

Right to withdraw a counter-claim upon a trial before a referee.

Upon the trial of an action before a referee the defendant may withdraw a counter-claim set up in his answer, in the same manner that the plaintiff may submit to a nonsuit on a trial at circuit, up to the time that the case is submitted to the jury.

When a counter-claim is thus withdrawn, it is improper for the referee to make any adjudication upon the merits thereof.

APPEAL by the defendant Walter P. Butler, as administrator, etc., from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 4th day of January, 1889, in favor of the plaintiff, upon the report of a referee.

James R. Marvin, for the appellant.

Edward F. Brown, for the respondent.

BARTLETT, J.:

This action was brought upon three promissory notes, aggregating \$2,200, made by W. I. Butler, and payable on demand to the order of J. F. Wyckoff. The defense chiefly relied upon on the trial was that the payee agreed to accept the professional services of the maker as an attorney and counselor-at-law in payment of the notes, and that the notes were fully paid by the rendition of such services. The referee found that the alleged agreement was made in regard to the mode of payment, but refused to find that the notes had been paid in the manner thus provided for.

The evidence on that question was conflicting, and we are not prepared to say that the conclusion reached by the referee was not correct.

There would be no occasion to interfere with the judgment, therefore, if it was confined to an adjudication that the plaintiff was entitled to recover from the defendant the amount of the notes, with interest and costs. It goes much further, however, and determines adversely to the defendant a certain portion of the counter-claim interposed by his amended answer, which his counsel had withdrawn in the course of the trial. The right thus to withdraw a counter-claim is questioned by the learned counsel for the respondent; but we cannot see why it does not exist, just as a plaintiff may submit to a nonsuit up to the time when a case goes to the jury. So far as his counter-claim is concerned, the defendant occupies the position of a plaintiff.

The judgment ought to be modified by striking therefrom the provisions relating to those portions of the counter-claim which were withdrawn during the progress of the reference, and, as thus modified, it should be affirmed, without costs to either party upon this appeal.

Judgment modified so as to exclude any adjudication on the merits of the counter-claim which was withdrawn, and, as thus modified, affirmed, without costs. Order to be settled by Mr. Justice BARTLETT.

VAN BRUNT, P. J., and BARRETT, J., concurred.

Judgment modified so as to exclude any adjudication on the merits of the counter-claim which was withdrawn, and, as thus modified, affirmed, without costs.

ELISE KOHLER AND OTHERS, PLAINTIFFS, v. JOHN
LINDENMEYR, DEFENDANT.

Special partner — the turning over of notes to the limited partnership is not a payment in cash of special capital — competency of partnership books as evidence.

In an action brought to charge a special partner with a liability of the firm, because of the alleged falsity of the statement, required by the statute, that the capital contributed by him had been paid in cash, it appeared that before the special partnership was formed there had been in existence a partnership of a like character, in which the present defendant was not a partner, but to which he had loaned money, to secure the repayment of which he had taken the notes of that partnership for the sum of \$20,000. These notes he contributed, as special capital to that amount, to the special partnership.

Held, that the transaction showed that the sum which the defendant purported to have contributed towards the special partnership had not been paid in cash, and that he was liable for the debts of the firm as a general partner.

In order to establish the fact of the notes of the old firm having been given to the defendant, the books of the old firm were admitted in evidence for that purpose.

Held, that the books of the old firm were properly admitted in evidence. (VAN BRUNT, P. J., dissenting.)

Also that entries in the books of the special partnership were competent as against the defendant, who was a special member thereof.

EXCEPTIONS ordered to be heard at the General Term in the first instance, after a verdict directed for the plaintiffs rendered by direction of the court.

The action was tried at the New York Circuit before the court and a jury on February 3, 1890, at which a verdict, in the sum of \$1,016.66, was directed in favor of the plaintiffs, and it was ordered that the exceptions be heard in the first instance at the General Term.

Samson Lackman, for the plaintiffs.

Lucien Birdseye, for the defendant.

BRADY, J. :

The object of this action was to establish the liability of the defendant as a general partner of the firm of P. Lenk & Company, wine dealers. An attempt was made on the 16th of November, 1885, to establish a limited partnership with the defendant Lindenmeyr and Otto Huber as special partners. The action was originally brought against both of these persons, but Huber having died it was

continued against the present defendant, a suggestion of Huber's death having been made upon the record at the time of the trial. The gravamen of the plaintiff's case is the alleged falsity of the statement that the capital furnished by the defendant was contributed in cash as stated in the certificate and affidavit filed under the statute relating to the subject. Upon the trial the plaintiffs sought to establish the averment of falsity suggested, and when they rested a motion was made to dismiss the complaint; but no grounds were stated of which that motion could be predicated and on which it should be granted. The counsel for the defendant then produced and read in evidence the affidavit of publication from the *World* and *Register* of the statutory certificate and other documents to establish the validity of that performance; in other words, compliance with the statute relating to the subject, and rested his case. No question was raised about the regularity of that proceeding, the plaintiffs' counsel, as already suggested, resting entirely upon the proposition that the statement of capital contributed was false, the same not having been paid in cash as required by the statute and the adjudications relating to the subject. The objections interposed on behalf of the defendant relate only to the sufficiency and competency of the proof to establish the asserted falsity of the certificate.

It appears conclusively that before the special partnership mentioned was formed there had been in existence another partnership of a like character under the same name of P. Lenk & Co., in which Otto Huber was a special partner but the defendant was not; that on the 12th of August, 1885, the defendant lent or advanced to that firm \$7,000 and received a promissory note of the firm for that amount, and, further, that on the twenty-eighth of September following, he lent or advanced to the firm the further sum of \$13,000 and received another promissory note of the firm for that amount; and it appears from the testimony given on behalf of the plaintiffs, that when the new partnership, of which the defendant was a special partner, was formed he appropriated the notes already mentioned, held by him, amounting, as we have seen, to \$20,000, as his capital in the new firm, and this was the mode in which he attempted to comply with the statute and to contribute cash to the new copartnership of which he became a member. These facts could not be proved without resort to the books of the old firm, and they were

used, it is evident, for that purpose, and for that purpose only, that is to say, to prove the giving of the notes mentioned for the sums of \$7,000 and \$13,000; and the books clearly show the entries of the notes mentioned and the appropriation of notes of a similar amount to the new firm, and not the amount of them in cash or any immediate conversion of them into cash, inasmuch as the amount of cash to the credit of the new firm established, by reference to the books of the new firm, shows conclusively that there was no such sum to its credit on hand or in bank.

The learned counsel for the defendant thinks that these entries were erroneously admitted, inasmuch as the defendant was not a member of the old firm, but they were entries relating to his transactions with the old firm and to his advantage and benefit, and from which, in the absence of any proof to the contrary, it should be presumed that the notes mentioned were issued and delivered to him as stated upon the books. At all events, they were *prima facie* evidence thereof, and there is nothing in the case to gainsay its truthfulness. It may be said, in addition, that if the capital was not contributed in the manner stated, according to the books of the new firm, as shown by Mr. Davidson, sworn on behalf of the plaintiffs, and who was an attorney at law and an accountant, it was not paid at all, because, as already suggested, he shows that the cash on hand on the 16th of November, 1885, and the bank balance united, amounted to but \$4,620.83 only. And this evidence was quite sufficient to put the defendant to his answer, which was made only by showing, as already stated, the publication of the notice and other papers required by the statute relating to the formation of special partnerships, nothing more. Under these circumstances, the evidence, properly received, seems to show conclusively that the sum the defendant purports to have contributed in cash was not paid in cash, and he, therefore, became, as a result, a general partner.

It is idle to urge the proposition upon which the counsel for the appellant lays some stress, that the books of the partnership of which the defendant became a member on the 16th of November, 1885, were not under his control and that he could not direct the making, altering or erasing of any entry in the books, even under the original statute as amended by section 17 of chapter 414 of the Laws of 1857. He could not employ or discharge a clerk or book-

keeper or govern him in the performance of any duty or service to the firm perhaps, but he had a right, under that section, from time to time, to examine into the state and progress of the partnership concerns, and might advise as to their management, and should have the same rights and remedies in the respects named in the statute as any other creditor. He might also negotiate sales, purchases and other business of the partnership. He was prohibited, it is true, from transacting business on account of the partnership except as stated in the section, and could not be employed for that purpose as agent, attorney or otherwise; but that he had a perfect right to examine the books within these lines for the purpose of ascertaining what entry had been made with regard to his capital there seems to be no question whatever. In answer to the facts and circumstances arrayed against him in reference to the payment of his capital, as sworn to by him in the certificate, it was incumbent upon the defendant to offer some evidence to overcome it.

It is well established that the entries in partnership books are *prima facie* as between the parties. (*Cheever v. Lamar*, 19 Hun, 130; 1 Phillips on Evidence, 449; 2 Wharton on Evidence, § 1132.) And it is said by a learned writer that, in the absence of an express agreement to the contrary, every partner has a right, without the permission of his copartners, to inspect, examine and make extracts from all the books of the firm. (1 Lindley on Partnership, 404; Bates on Partnership, § 978.) As a special partner, as we have seen, he might, from time to time, examine into the state and progress of the partnership concerns, and advise as to their management (1 R. S., 766, § 17; vol. 4 [8th ed.], p. 2495), and he certainly could look after his capital, and he was bound so to do. Strict compliance with the statute in reference to special partnerships is demanded. As said by Judge FOLGER in *Van Ingen v. Whitman* (62 N. Y., 520): "The statement of the amount of the cash payment is required so that the public may gauge thereby the extent of its dealings with the firm. The affidavit is called for that the public may have reliance upon the existence of the fact of payment. The statute is thwarted, the public is misled, and its reliance is misplaced and deceived as much when there is an unintentional untruth as when there is an intentional one. This statute does not set out to deal with motives, but with acts and their results; and it guards

the public not by requiring good intentions, but a certain act done in a certain mode, and a true statement that it has been done thus." When the supposed true statement, therefore, is fairly and successfully impugned as false, it behooves the assailed partner to establish by reasonable evidence that the assault is unwarranted, and the statement true in fact.

For these reasons the exceptions should be overruled and judgment upon the verdict ordered for plaintiff.

DANIELS, J., concurred.

VAN BRUNT, P. J.:

I think that the admission of the entries in the books of the old firm was error. The defendant had nothing to do with those books or the entries therein contained. He was not a partner of the firm whose books they were, and because he subsequently became a special partner he did not become chargeable with notice of the entries which had been made previously in the books of the firm. I, therefore, dissent.

Exceptions overruled and judgment upon the verdict ordered for plaintiff.

JOHN M. KNOX AND OTHERS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD SMITH CLARK, RESPONDENTS, v. THE METROPOLITAN ELEVATED RAILWAY COMPANY AND THE MANHATTAN RAILWAY COMPANY, APPELLANTS.

Executors and trustees may recover the damage caused to property by an elevated railroad, as well that caused before as that arising after their testator's death — effect of acquiescence in a trespass — remedy.

In an action brought to restrain the operation of an elevated railroad by the executors and trustees under the will of a deceased owner of property abutting upon the street through which said railroad runs, the plaintiffs are entitled to recover such damages as resulted from the loss of rental values during the testator's lifetime, and also such as resulted from the operation of the defendant's road subsequent to the testator's death, and can recover in one action in both capacities.

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No acquiescence, short of twenty years, will bar a party from complaining of a nuisance, unless by some act or omission he has induced the party causing it to incur large expenditures or to take some action upon which an estoppel may be based. Where a structure is authorized by law which, without such authority, would constitute a nuisance, the same rule applies, and a person whose property rights are taken may complain of a failure on the part of the railroad to offer him due compensation or to condemn his property under the right of eminent domain.

The mere failure to assert his rights while an elevated road is in process of construction does not preclude an abutting owner damaged thereby from maintaining an action for damages or an injunction, or operate as an estoppel against him. The only remedy by which a party, under such circumstances, can obtain just compensation for the property taken, is by an action in equity to restrain the continuance of the trespass, and to deprive him of an injunction *nisi* would be to leave him remediless.

A judgment will not be reversed on appeal because of inconsistent conclusions of law, where the judgment directed to be entered is in accordance with the correct conclusions of law on the facts found.

APPEAL by the defendants from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 12th day of June, 1890, in favor of the plaintiffs, after a trial at Special Term in the county of New York.

The action was brought to obtain an injunction restraining the operation of the defendants' railroad, in front of plaintiff's premises Nos. 767, 769 Sixth avenue, and to recover the damages resulting from loss of rents occasioned by such use.

The judgment directed that the defendants should deliver to the plaintiffs, or their attorneys, a written offer to pay to the plaintiffs the sum of \$10,500, and interest from the date of entry of the judgment, and that, upon the plaintiffs tendering to defendants, within thirty days after judgment, a duly executed conveyance or grant of so much of the property of the plaintiffs in Sixth avenue, and the easements appurtenant to the abutting property described in the judgment, as had been taken or appropriated by the defendants for the purposes of their railroad, that said defendants pay said sum of \$10,500, with interest, to the plaintiffs, in which event the injunction which was granted by said judgment perpetually enjoining and restraining the defendants from maintaining, or in any way using, the elevated structure on Sixth avenue, in the city of New York, in front of or adjoining the plaintiffs' premises, should be inoperative and void.

E. C. James, for the appellants.

J. E. Burrill, for the respondents.

BARRETT, J. :

It is contended that the plaintiffs cannot maintain this action because, in the caption of their complaint, they have styled themselves "as executors" and not "as trustees." In the body of the complaint, however, they set forth the testator's will and allege the devise of the property in question (under the residuary clause) to his executors in trust to divide the same into eight equal parts, and to hold one of said parts for the benefit of each of eight grandchildren during his or her natural life, and to receive the rents, issues and profits thereof and to apply the same to the use of such grandchild during his or her natural life. It was proper, under such circumstances, to describe the plaintiffs as "executors." They are, *ex officio*, invested with the title for trust purposes, and as such they are entitled to maintain the action. Were it otherwise, the averments in the complaint are sufficient to affix to the plaintiffs their proper representative character, and when that appears in the body of the complaint an erroneous description in the caption is immaterial. (*Stihwell v. Carpenter*, 2 Abb. N. C., 238; *Beers v. Shannon*, 73 N. Y., 297.)

It is also claimed that the plaintiffs did not take title under Mr. Clark's will, or rather that their title was deferred until the actual partition of the estate into eight parts, and that, until such division, the fee passed to the heirs-at-law, subject to the execution of the power to divide, etc. This is an inaccurate view of the legal effect of the will. Under the sixth clause the residue of the estate, real and personal, was devised to these executors "in trust to receive the rents, issues and profits thereof, and to apply the same to the use of my said grandchildren during their respective natural lives, one share being held in trust for each grandchild." Under this clause the executors took the whole estate, in law and in equity, subject only to the execution of the trust. This is entirely consistent with the creation of eight separate trust estates. In law the separation of the trust estates is effected by the provisions of the will, and this is not dependent upon an actual division or partition in specie. Prior to such actual division or partition, the executors,

in their trust capacity, are vested with each of the undivided eight shares in trust for each of the eight grandchildren, and thus they are vested with the whole. The absolute power of alienation is not unlawfully suspended by the consolidation of an estate into one trust so long as it is a "trust for distribution and payment to each beneficiary or class of beneficiaries upon the events specified in the will." (*Wells v. Wells*, 88 N. Y., 332, 333; *Monarque v. Monarque*, 80 id., 324; *Stevenson v. Lesley*, 70 id., 515.) In such a case the trustees are vested with the whole estate just as all the tenants in common of a piece of real estate are so vested, but the legal rights of each *cestui que trust* are separate and distinct.

The plaintiffs' rights are not affected by the death of one of these eight grandchildren (Mary C. Le Roy) subsequent to the commencement of this action. Damages were not awarded to the plaintiffs for trespasses committed after Mary C. Le Roy's death. Such damages were limited to the time of the commencement of the action. The plaintiffs were clearly entitled to all these damages. As executors, they were entitled to such as resulted from loss of rental values in the testator's lifetime. As trustees, in their executorial capacity, vested with the fee, they were entitled to such as resulted from loss of rental values after the testator's death. And in such an action as the present they could recover in both capacities. (*Shepard v. Manhattan Railroad Company*, 117 N. Y., 442.) Upon the issues as they stood at the time of the trial, they were also entitled to an injunction. There was no plea of a defect of parties, and no injustice was done by a refusal to permit the cause to stand over to enable the defendants to raise this technical point.

Upon the death of Mary C. Le Roy the undivided share held in trust for her passed, under Mr. Clark's will, to the other seven grandchildren. The court provided that the injunction, to which the plaintiffs were absolutely entitled under the pleadings as they stood, should not go into effect in case the defendants tendered the adjudged value of the easement. And upon such tender the court required the plaintiffs to deliver to the defendants a proper conveyance, duly executed by all of these seven grandchildren, as well as by the executors and trustees. The court thus made ample and even superfluous provision against any possible prejudice to the defendants resulting from the failure to make

these seven grandchildren parties. We say superfluous, because the plaintiffs, even after the vesting of Mary C. Le Roy's share in these seven grandchildren, had a power of sale entirely sufficient to confer upon the defendants a perfect title to these easements.

There is nothing in the point as to the statute of limitations. The trespasses are continuous and a cause of action accrues daily. The equitable cause of action which accrued ten years ago resulted from the continuous trespasses then committed. The present cause of action is based upon the continuous trespasses of to-day. There can be no limitation to such action, whether legal or equitable, short of the twenty years from which a grant is presumed.

There is no greater force in the claim of acquiescence, and the cases cited by the appellants on that head (including specially *Hentz v. Long Island Railroad Company*, 13 Barb., 655; *McAulay v. Western Vermont Railroad Company*, 33 Vt., 311; *Goodwin v. C. and W. Canal Company*, 18 Ohio St., 169), are entirely inapplicable. They proceed either upon the doctrine of estoppel or upon the principle that an injunction should not be granted until all the ordinary means for obtaining indemnity have failed. The rule governing estoppel is clearly inapplicable. To constitute an equitable estoppel there must have been some act or admission by the party sought to be estopped inconsistent with the claim he now makes, and done or made with the intention of influencing the conduct of another, which he had reason to believe would, and which did, in fact, have that effect. Silence will not estop unless there is not only a right but a duty to speak. (*N. Y. Rubber Co. v. Rothery*, 107 N. Y., 310.) In *Campbell v. Seaman* (63 N. Y., 568) it was held that no acquiescence short of twenty years will bar one from complaining of a nuisance, unless by some act or omission he has induced the party causing the nuisance to incur large expenditures or to take some action upon which an estoppel may be based. (See, also, *Haight v. Price*, 21 N. Y., 246.) In *Chapman v. City of Rochester* (110 N. Y., 277) the question of estoppel by acquiescence was also considered. The city had there constructed sewers in such a manner as to render the water in a creek above the plaintiff's land unfit for use. DANFORTH, J., speaking for the court, said that the plaintiff was not estopped by acquiescence in the proceedings of

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the city in devising and carrying out its system of sewerage. "It does not appear," he observed, "that the plaintiff in any way encouraged the adoption of that system, or by any act or word induced the city authorities to so direct the sewers that the flow from them should reach his premises."

The defendant's structure, being authorized by law, is not a nuisance, but for that very reason the rule enunciated in *Campbell v. Seaman* and *Chapman v. City of Rochester* should be applied, and applied even more stringently than in the case of a nuisance. Where the structure is authorized by law the property owner cannot complain of it *per se*. His only complaint is of the failure to offer him due compensation or to condemn his property under the right of eminent domain. In the present instance it cannot truly be said that the property owners stood by and permitted large or any sums to be expended on the faith of their apparent acquiescence. Acquiescence in what? In the building of the road? Yes, but, even as to that, the word "resignation" would better express the property owner's condition. Not, however, in the taking of their property without compensation. The elevated railroad was constructed with the clear understanding that there was no such acquiescence. It was constructed, as already suggested, under legislative authority, authority claimed to be sufficient to entitle the promoters of the enterprise to appropriate these easements without compensation. The property owners saw the road built regardless of their wishes and in defiance of their rights. It has been repeatedly held, and it is sound doctrine, that failure to assert their rights while the road was in process of construction did not, under the circumstances, work an estoppel. The promoters of the railroad proceeded in reliance upon what they supposed to be the law (*Powers v. Manhattan Railroad Company*, 120 N. Y., 178), not at all in reliance upon the property owner's inaction. And the latter's acquiescence was, as we have seen, only in the construction of the road under legislative authority, not in the appropriation of their easements without just compensation. The road was built in the year 1878, and it was not until the year 1882 that the Court of Appeals finally decided that compensation was a right. (*Story v. N. Y. Elevated Railroad Company*, 90 N. Y., 122.) Even after this decision the property owner had no direct means of compelling compensation. He cannot apply

under the act with regard to condemnation proceedings nor can he compel the corporation to apply. He certainly cannot maintain ejectment for the easements of light, air and access. Nor can he secure the value of his easements in actions of trespass for the damages sustained day by day. (*Pond v. Metropolitan Elevated Railway Company*, 112 N. Y., 186.) "A recovery of judgment for damages for a trespass or the invasion of an easement," said ANDREWS, J., in the *Pond Case*, "does not operate to transfer the title of the property to the defendant, either before or after satisfaction, nor does it extinguish the easement."

The only remedy, then, whereby just compensation for the property taken can be compelled is an action in equity to restrain the continuous trespasses. To deprive the plaintiff of an injunction *nisi* would, therefore, be to leave them remediless in that regard. It would be to admit the existence of a distinct wrong without a specific remedy, and it would also be to permit the possibility of the wrong ripening by presumption into a right. It was held in *Campbell v. Seaman* (*supra*) that under our present system the right to an injunction in a proper case is just as fixed and certain as the right to any other provisional remedy. It is no longer a matter of grace, "except," as EARL, J., observed, "that it rests in the sound discretion of the court, and that discretion is not an arbitrary one." "It can rightfully be demanded to prevent irreparable injury, interminable litigation and multiplication of suits."

We think, therefore, that the remedy by injunction was properly granted in the present case.

The only other point calling for special consideration is that based upon the seeming inconsistency in the conclusions of law found by the learned judge at Special Term.

In the fifteenth and sixteenth findings of fact the learned judge finds the diminution of the rental value of the plaintiffs' premises, caused by the erection, maintenance and use of the defendants' railroad from the 14th day of June, 1883, to the 14th day of June, 1889. In the first conclusion of law he finds that the plaintiffs are entitled to recover from the defendants the damages awarded by these findings of fact.

At the request of the defendants, however, he found, in the fourth conclusion of law, that the plaintiffs are not entitled to recover any

damages in this action which occurred prior to the death of their testator, the 11th of July, 1884. This was plainly an inadvertence. The learned judge had already found, and correctly, that the plaintiffs were entitled to recover these very damages. If the inconsistency had been in the findings of fact, the appellants might have invoked the rule that where such findings are irreconcilable, those most favorable to them should be taken. (*Redfield v. Redfield*, 110 N. Y., 673.) There is, however, no inconsistency in the facts found, and upon these there can be no doubt as to the proper conclusion of law. It is that the plaintiffs are entitled, as found in the first conclusion of law, to recover the sums specified in the fifteenth and sixteenth findings of facts. We agree with the Superior Court in *Welsh v. Metropolitan Elevated Railway Company* (57 Supr. Ct. Rep., 411, INGRAHAM, J., writing the opinion), that "no principle requires us to reverse a judgment, because of inconsistent conclusions of law, when the judgment directed to be entered is in accordance with the correct conclusions of law on the facts found."

The sums awarded for past damages and allowed for the value of the easements were reasonable. We have examined the evidence on this head and see no reason for disturbing the findings of the learned judge at Special Term. And we are at a loss to understand what the appellants mean by the assertion in their brief that these sums have been awarded arbitrarily and without evidence to sustain them. Such assertions are gratuitous and without justification in the record.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., and BARTLETT, J., concurred.

Judgment affirmed, with costs.

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ALFRED C. BARNES AND OTHERS, RESPONDENTS, v. SARAH FRANCES BLAKE, APPELLANT, IMPEADED WITH EDWIN M. BARNES AND OTHERS.

Action for an accounting and the construction of a will by the executors and trustees thereof — questions arising between a legatee and his assignee may be determined in such an action.

In an action brought by executors and trustees under a will for a final settlement of their accounts, and to obtain a construction of the will, the assignees of a legatee under the will are properly made parties, and their rights, as against such legatee, may properly be determined in such action.

It is not a misjoinder of causes of action to state in such a complaint a claim made by such assignees against the legatee.

APPEAL by the defendant Sarah Frances Blake from an order and interlocutory judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 3d day of May, 1890, overruling the demurrer of the defendant Sarah Frances Blake to the plaintiffs' complaint, with costs.

C. B. Smith, for the appellant.

F. B. Candler, for the respondents.

VAN BRUNT, P. J.:

The plaintiffs in this action are the executors and trustees under the will of Alfred S. Barnes, deceased, and it is claimed by them that this action was brought for a final settlement of their accounts as such executors and trustees, and for a construction of the will of the deceased in respect to certain points which it is necessary to settle before said accounts can be finally disposed of.

The defendants are the parties interested under the will, and the assignees of the appellant one of the legatees. The complaint sets forth the circumstances of the various assignments and the indebtedness which, it is alleged, they were made to secure. It is claimed upon the part of the appellant that there has been a misjoinder of causes of action, in that it combines a cause of action by the executors for an accounting with a cause of action by the alleged creditors against the appellant.

We do not think that this objection is well taken. It may be true that the executors, in the bringing of this action, might have alleged that the assignees of the appellant claimed a share of her interest in the estate, leaving it to them to set up the particulars. But, in order that there may be a final determination and settlement of the accounts, and of all questions in relation thereto, it was necessary that they should make parties all persons claiming an interest in said estate, whether as legatees or devisees, or assignees of legatees and devisees. The assignee of a legatee has as much right to be heard in reference to the adjustment of the accounts of the estate as the original legatee. He is just as much a necessary party, and his claim against the original legatee must be settled before a decree of distribution can be made; and certainly it cannot in any way invalidate the complaint to state all the facts, as the plaintiffs understand them, necessary to a proper determination of the questions which such facts bring up for adjudication.

If the appellant had not executed assignments of her interest in the estate to these various defendants, although she may have been indebted to them, clearly they would have been improper parties to the action. But she having given them a specific lien upon her interest in the estate by assignment, they were entitled to be heard as to the distribution, its method and amount. And although, incidentally, the questions as to the indebtedness of the appellant to these assignees may arise, yet they are kindred to the subject matter of the action, viz., the accounting of the executors, and the determination under the terms of the will as to how charges against the various devisees are to be made.

It is conceded, upon the part of the appellants that, perhaps, all of them may be proper parties, but it is urged that it is not necessary to discuss that question here, the objection being not that there is a misjoinder of parties, but that there is a misjoinder of causes of action, and that there is no power of the court or authority in law compelling the different defendants to litigate in this action their rights and claims against the defendant Blake.

It is clear, however, from what has already been said, that if these defendants choose to litigate their claims against the defendant Blake they have a right to do so, and they are not complaining of the allegations in the complaint. If there had been no allegations

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in reference to the claims of the defendants out of which these assignments arose, each assignee would have a right to set up his particular claim against the estate and have had it determined here, as they are, by reason of their assignments, the representatives of the defendant Blake to the extent of their respective claims. The defendant Blake cannot take the objection that these creditors cannot be forced to come in and litigate their claims against her in this action; and if these various assignees do not choose to assert their rights here, they have a very easy remedy by disclaiming in their answer all interest in the estate as the assignees of Mrs. Blake. Until this is done, they having made the claims against the estate by reason of the assignment, they are not only necessary parties, but the grounds upon which they claim may with propriety be set forth in the complaint.

We are of opinion, therefore, that there has been no improper joinder of causes of action; that the complaint is one for an accounting and the construction of the will, and that the other allegations in reference to the assignments made by the defendant Blake of interest in her share of the estate are mere incidents in respect to the accounting and construction.

The judgment should be affirmed, with costs and with leave to the appellant, upon payment of the costs of this court and of the court below within twenty days after notice of the entry of the order upon this decision, to withdraw her demurrer and serve an answer.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed, with costs, and with leave to appellant, upon payment of the costs of this court and of the court below within twenty days after notice of the entry of the order upon this decision, to withdraw her demurrer and serve an answer.

HESTER BATES, ALTHEA SCHMID AND ISAIAH KEYSER,
APPELLANTS, v. WILLIAM H. JOHNSTON, BENJAMIN B.
JOHNSTON AND LUCRETIA JOHNSTON, RESPONDENTS,
IMPLEADED WITH MARY BINGHAM, APPELLANT.

Landlord and tenant — a covenant to pay rent, and a covenant to pay at the expiration of the lease one-half of the appraised value of buildings erected by the tenant, when dependent covenants.

A lease of certain premises in the city of New York contained covenants for the payment of rent, taxes, etc., by the lessees, and a grant, in consideration thereof, for the period of twenty-one years from May 1, 1867. It further provided, that in case of the non-payment of rent, or, if default should be made in any of the covenants contained in the lease, that the lessors should have the right wholly to re-enter upon said premises and remove all persons therefrom, and the same to have again, repossess and enjoy as in their first and former estate. The lessees covenanted to erect a building upon the demised premises of certain dimensions, which it was agreed should, at the expiration of the term, be appraised, and either one-half of the appraised value be paid to the lessees or that the lessors would give a renewal of the lease.

The lessees made default in the payment of rent and taxes during the term, and, in December, 1879, were dispossessed in summary proceedings.

The term of the original lease having expired in May, 1888, an action was brought by the successors of the lessees to have the value of the building, which had been erected by the lessees, appraised and to have one-half of its appraised value paid to the plaintiffs.

Held, that the provision of the lease that in case of a default upon the part of the lessees the lessors might re-enter and enjoy the premises, as in their first and former estate, showed an intention that, in case of a default upon the part of the tenants, the whole estate should revert to the lessors unincumbered by anything that the lessees might have done.

That the covenants as to the effect of a default, and as to the right to recover the appraised value of the building, were to be considered dependent, and not independent, covenants.

APPEAL by the defendant Mary Bingham from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 20th day of December, 1889, dismissing the complaint and awarding judgment to the defendants, William H. Johnston, Benjamin B. Johnston and Lucretia Johnston, against the plaintiffs, and against Mary Bingham; also an appeal by the plaintiffs from the same judgment.

The action was brought upon a covenant made by the lessors in a lease, dated November 19, 1866, to pay at the expiration of the

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term granted, twenty-one years from May 1, 1867, in default of their granting a renewal for a like term, one-half of the appraised value of the buildings to be erected by the lessees on or before the 1st day of May, 1868.

James M. Bishop, for the plaintiffs, appellants.

L. Sanders, for defendant Bingham, appellant.

Thompson & Koss, for the respondents.

VAN BRUNT, P. J :

This action was brought to recover one-half of the value of buildings now standing on certain lots in the city of New York, which the plaintiffs claim to be due to them and the appellant Bingham from the defendants Johnston, the lessors, pursuant to the provisions of a lease of said property for twenty-one years from the 1st of May, 1867.

This lease contained covenants for the payment of rent, taxes, etc., upon the part of the lessees, and a grant, in consideration of the covenants contained in the lease, for the period of twenty-one years. It also contained a provision that, in case of the non-payment of rent or if default should be made in any of the covenants contained in the lease on behalf of the lessees, that the plaintiffs should have the right wholly to re-enter on said premises and remove all persons therefrom, and the same to have again, repossess and enjoy *as in their first and former estate*, anything therein contained to the contrary thereof in anywise notwithstanding. The lessees covenanted to erect a building upon the premises of certain descriptions and dimensions, and the lease contained a mutual covenant by the parties that, at the expiration of the aforesaid term, the buildings upon the premises should be appraised, and either one-half of such appraised value paid to the lessees or the parties of the first part would give a renewal lease.

The lessees defaulted in the payment of rent and taxes, and in December, 1879, were dispossessed by summary proceedings. The term of the original lease having expired in May, 1888, the successors of the lessees brought this action to have the value of the buildings appraised, and the sum due and payable to the plaintiffs

and the defendant Bingham, under the provisions of the lease, ascertained and determined, etc.

It might not be necessary to add anything to the opinion rendered by the learned judge who tried the cause in the court below, but, in view of the claim which is made because of the decision in the case of *Finkelmeier v. Bates* (92 N. Y., 172), it may not be improper to add one or two suggestions to the views which in said opinion were expressed.

It is undoubtedly true that in the case cited, where the covenants of this identical lease were under consideration, the court may have used language which might be construed into an affirmance of the claim of the appellants that the covenant to pay one-half the value of the building is an independent one, but no such question was before the court at that time, and the language used by the court was simply an answer to the question which was then before the court for its decision, and in no way was it attempted to forestall or to decide upon a claim such as is presented in the case at bar. All that was decided in that case was that the time fixed in the covenant to pay for the building was the expiration of the term, and that that phrase related to time, and not to the estate of the lessee.

The provision of the lease in regard to re-entry was to the effect that, in case of a default upon the part of the lessees, the lessors might re-enter, repossess and enjoy the premises in question as in their first and former estate. Now, if the lessors were under an obligation to pay for these buildings at the expiration of the term mentioned in the lease, and such obligation was a lien upon these premises, how was it possible for them to re-enter, have again, repossess and enjoy as in their first and former estate? Here is a clear intention shown by the contract itself that, in case of a default upon the part of these tenants, the whole estate shall revert, unincumbered by anything that the lessees may have done, to the lessors, who shall hold the premises thereafter as in their first and former estate. This seems to be a clear definition of the rights of these parties; and it seems to us that these covenants were considered by the parties to be dependent, and not independent. The lessees were to enjoy the premises and to have a right to payment for the buildings or a renewal of the lease upon condition of their performing the covenants contained in the lease. This necessarily followed from

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the fact that continued enjoyment of the premises by the lessees was undoubtedly contemplated, because the covenant for the payment for the buildings is coupled with a covenant to renew the lease, which would be impossible if the lease had ceased to exist years before the time to claim such a renewal had arrived. All these circumstances show clearly that the condition upon which the tenants were to be in a position to claim payment for the buildings was a compliance with the covenants in the lease. The grant is made in consideration of the rents, covenants and agreements mentioned in the lease. They were the consideration for the grant, and to say that the lessees may repudiate the consideration which they have to pay, and then claim performance of the covenants on the part of the lessors, does not seem to be equitable or just, and we do not think is the law.

We think, therefore, that the judgment should be affirmed, with costs.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed, with costs.

THIRD NATIONAL BANK OF SPRINGFIELD, Mass.,
RESPONDENT, v. ORLANDO B. HASTINGS, DOING BUSINESS UNDER THE FIRM NAME OF HASTINGS & TODD,
APPELLANT.

Effect, as regards an accommodation maker of a note, of an acceptance of a dividend from the estate of the payee under the insolvency laws of another State by the creditor, a resident thereof.

In an action brought against an accommodation maker of a note by a national banking association, located at Springfield, in the State of Massachusetts, the defendant, who resided in the State of New York, proved that the Hurlbut Paper Company, the payee of the note, for whose accommodation the note was made, was adjudged to be insolvent, under the laws of the State of Massachusetts, in proceedings duly had there; that the plaintiff proved its debt under the insolvency proceedings, which resulted in the release and discharge of the debtors, upon their paying twenty per cent of their indebtedness, which percentage was received by the plaintiff upon the note.

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Held, that the discharge of the Hurlbut Paper Company under the Massachusetts insolvent laws, and the acceptance of a dividend by the plaintiff, did not furnish a defense to the defendant.

That, under the circumstances of this case, the appearance of the plaintiff, the creditor, in the insolvency proceedings, and the acceptance of the dividend, in no way deprived the accommodation maker of the note of any rights which he could have insisted upon, as against the debtor, had there not been such an appearance and acceptance of the dividend.

Seem, that the rule is otherwise where the debtor and creditor do not reside in the same State.

Quare, whether the courts of the State of New York, as against a resident thereof, would give effect to a provision of the insolvent laws of the State of Massachusetts, providing that a discharge thereunder should not release or discharge a person liable for the same debt as partner, joint-contractor, indorser, surety or otherwise.

APPEAL by the defendant Orlando S. Hastings from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 24th day of December, 1889, for \$2,907.50, in favor of the plaintiff.

The action was brought to recover upon a promissory note made by the defendant, under the firm name of Hastings & Todd, to the order of the Hurlbut Paper Company, by which company it was indorsed and delivered to the plaintiff.

F. B. Candler for the appellant.

J. L. Bishop, for the respondent.

VAN BRUNT, P. J. :

This action was brought to recover upon a promissory note made by the defendant under the firm name of Hastings & Todd to the order of the Hurlbut Paper Company, properly indorsed and delivered to and held by the plaintiff. The defendant made the note for the accommodation of the Hurlbut Paper Company, under which name Thomas O. Hurlbut and H. C. Hurlbut conducted business as copartners. The Hurlbuts were afterwards adjudged insolvent under the laws of the State of Massachusetts in proceedings instituted in the Court of Insolvency for the county of Berkshire in that State. The plaintiff proved its debt under the insolvency proceedings, which resulted in a composition and discharge of the debtors under said act, by which it was adjudged that upon the debtors paying into court a sum sufficient to pay to their creditors

twenty per cent of their indebtedness a certificate of discharge should be granted them. They made the payment and the discharge was granted. The plaintiff received twenty cents on the dollar upon the claim proved, which claim included, among other things, the note in suit.

The plaintiff is a national banking association, organized under the United States statute, at Springfield, in the county of Hampden and State of Massachusetts, where it was located and had its place of business. The Hurlbuts were both residents of the State of Massachusetts, and the defendant was a resident of this State.

The question presented at the trial was whether the discharge of the Hurlbuts under the Massachusetts insolvent law furnishes a defense to the defendant as against his liability as maker of the note in suit.

The court directed a verdict for the plaintiff, and from the judgment thereupon entered this appeal is taken.

It is urged, upon the part of the plaintiff, that conceding that the defendant occupied the position of accommodation maker and the Hurlbuts were principal debtors, the discharge of the Hurlbuts in the insolvency proceedings would not discharge the liability of the defendant, because, under the insolvent laws of Massachusetts, it is expressly provided that a discharge shall not release or discharge a person liable for the same debt as partner, joint contractor, indorser, surety or otherwise. This proposition it does not seem to be necessary to decide in the disposition of this case. But it is doubtful whether the courts of this State, as against a resident of this State, would give effect to this provision of the statute law of Massachusetts in contradiction of its own policy in that regard. But we think there is another proposition which is fatal to the defendant's contention, and that is the plaintiff, the owner of the debt, and the Hurlbuts, the debtors, were both residents of Massachusetts. The insolvency court acquired jurisdiction, both of the subject matter, viz., of the debt due to the plaintiff and of the persons, both debtors and creditor. The discharge of the debtors under the insolvent laws discharged the debt as to them, whether the creditor appeared or not, and, therefore the appearance of the creditor and the taking of the dividend in no way deprived the surety of any rights which he could have maintained had not such appearance been had.

It is a well-established principle that where debtor and creditor reside in the same State and the debtor is discharged by the insolvent laws of that State that the discharge is valid everywhere. And it is equally well settled that where a debtor and creditor are residents of different States a discharge under the bankrupt laws of the State where the debtor is domiciled will not operate as a discharge of the debt in the State where the creditor is domiciled. It was for this reason that it was held in the cases cited by the defendant that the appearance of the creditor in the bankruptcy court, and thus conferring jurisdiction upon the bankruptcy court, although not a resident of the country over which the court had jurisdiction, and the accepting of a dividend, discharged the surety. In such a case, unless the creditor had intervened, the discharge would have had no effect upon the debt in the jurisdiction where the creditor and the surety lived, and the property of the debtor which might come into that jurisdiction could be made subject to the payment of the debt. But no case has been found, and no principle adverted to, where the debtor and creditor reside in the same State, and the discharge would be operative whether the creditor appeared and proved his debt or not, holding that the proving of a debt or the taking of a dividend by the creditor discharges the surety.

The whole theory of these decisions is that the surety is entitled to be subrogated to the rights of the creditor; and that in a case where the discharge becomes operative as to the debtor the right of the surety is cut off without his having an opportunity to be heard; and where that is done voluntarily by the creditor he cannot subsequently come upon the surety for any portion of the debt. But where the discharge has taken place involuntarily, or where, whether the creditor appeared or not, the same result would have followed, except that the surety's liability would have been increased because the debt would not have been diminished by the dividend, the rule in the cases cited cannot apply.

It is urged, upon the part of the appellant, that the mere fact that the creditor resided in the State with the bankrupt would not destroy a foreign surety's right to subrogation. But in this proposition the learned counsel overlooks the principle which is conceded in the cases of *Gardner v. Oliver Lee's Bank* (11 Barb., 558) and *Phelps v. Corland* (103 N. Y., 406) that if the bankrupt court acquired jurisdiction

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of the creditor without his intervention, the debt would have been discharged and the surety would have lost no rights. And those cases were decided as they were, only because the creditor voluntarily intervened, and gave the court jurisdiction to so discharge the debt that the rights of the surety were gone. If a bankruptcy court, having jurisdiction of the person of the creditor, could not discharge the debt so that the right of the surety would be extinguished, it could not do so where the creditor having appeared, being a non-resident, thus conferred jurisdiction. But the contrary is the rule recognized by the cases above cited, viz., that where the court has jurisdiction of the person in proceedings of this description, where the creditor is a resident within the jurisdiction of the insolvency court, its decree discharges the debtor absolutely, and there are no rights against the debtor to which anybody can be subrogated.

The judgment should be affirmed, with costs.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. JAMES DOYLE, APPELLANT.

Discussing before the jury the defendant's failure to go upon the stand in a criminal case—is ground for a new trial—felonious intent in grand larceny—evidence as to.

Upon the trial of a person accused of crime the district attorney has no right to discuss before the jury the refusal of the defendant to go upon the witness stand; and when such remarks are made and objected to, either in the opening or summing up of the case, and no attempt is made by the court to repair the damage done by cautioning the jury in this regard, the defendant will be awarded a new trial upon appeal.

Such action upon the part of the district attorney is a clear violation of law and prejudicial to the defendant, putting him in a false position before the jury and compelling him to testify when otherwise he might not have done so.

On the trial of a prisoner, charged with grand larceny in the first degree, it is necessary that the prosecution should establish a felonious intent upon the part of the prisoner, and where the offense consists in drawing out from a bank money which had been deposited there in the names of the prisoner and another

party, since deceased, it is error to exclude evidence as to statements made by such deceased party prior to his death, in reference to his having made a gift of the money belonging to him in the bank to the prisoner, even though such gift may have been ineffectual in law, as the evidence would be pertinent upon the question of intent.

APPEAL by the defendant James Doyle from a judgment, rendered against him at the Court of General Sessions of the county of New York on the 18th day of April, 1889, convicting him of the crime of grand larceny in the first degree.

The defendant was indicted for misappropriating the sum of \$7,500, the property of Thomas G. Doyle, as administrator, etc., of William Doyle, deceased. William Doyle was a brother of the defendant and died in 1887.

J. R. Henzleman, for the appellant.

M. Semple, for the respondent.

VAN BRUNT, P. J.:

The manner in which the assistant district attorney conducted the prosecution of this case was certainly of a character which should call for the censure of the court, and which requires a reversal of the conviction. In his opening of the case he stated to the jury that he was curious to know whether the defendant would go upon the stand, since he had found Lee, and have anything to say about how much money he spent with Lee; that the defendant might listen to prudent counsel and not go on the stand.

To these remarks the counsel for the prisoner objected and excepted; and called the attention of the court to them, but all that was done was, the court ordered his objection and exception to be noted.

It is quite well settled that the prosecution have no right to predicate anything upon the refusal of the defendant to go upon the stand. In the case of *Ruloff v. People* (45 N. Y., 222) the court, in adverting to this subject, say: "Neither the prosecuting officer or the judge has the right to allude to the fact that a person has not availed himself of this statute; and it would be the duty of the court promptly to interrupt a prosecuting counsel who should so far forget himself and the duties of his office as to attempt

to make use of the fact in any way to the prejudice of a person on trial. An allusion by the judge to the fact, unexplained, cannot but be prejudicial to a person on trial; and a provision intended for his benefit will prove a trap and snare. It is an intimation to the jury of the effect upon his mind of the omission of the accused to explain by his own oath, suspicious and doubtful facts and circumstances, as affecting the question of guilt or innocence."

The remarks made by the assistant district attorney to the jury were a challenge to the defendant which compelled him to go upon the stand, or the fact of his refusal would necessarily be considered by the jury to his prejudice. This the attorney had no right to do. He had no right to advert, in any manner or way, upon the question as to whether the defendant would become a witness. And if he had no right to suggest the fact in his summing up, he had no right to press it upon the minds of the jury at the opening of the trial. It does not appear that there was any attempt, upon the part of the learned judge presiding, to repair the damage done by cautioning the jury in this regard. All that the defendant received was the notation upon the record of an objection and exception.

It seems to us that the action of the assistant district attorney was a clear violation of law which was prejudicial to the defendant, putting him in a false position before the jury and compelling him to testify when otherwise he might not have done so. The gravity of this error is enhanced by the course of the testimony, because we find that this defendant had been examined in supplementary proceedings upon a judgment obtained against him to recover the very money which is the subject of this indictment. And evidence as to what he testified to upon this examination was offered. It is true it was not objected to, but it was clearly improper and incompetent, as such evidence could not, by the provisions of section 2460 of the Code of Civil Procedure, be used against him in a criminal action or a criminal proceeding. If it were not for the exemption contained in this section, a party might shield himself always in supplementary examinations where there was any question of fraud by claiming his privilege, and it was to avoid the failure of justice, by reason of this claim, that it was enacted that evidence given under these circumstances should not be used against the witness.

There is, however, another question raised by an exception where evidence seems to have been improperly excluded. One of the vital questions in the case was as to the relations of William Doyle and the defendant in respect to certain moneys which belonged to William Doyle and which he had deposited in certain savings banks. It was in evidence that William Doyle had changed these deposits from his own individual name to that of himself and the defendant, and in respect to one deposit he opened a new account in his name in trust for the defendant.

It was claimed by the defendant that the bank-books were delivered to him and he had charge of them from that time until he drew out the money, after the death of William. The wife of the defendant was being examined upon the part of the defendant, and she stated that she remembered a conversation between William Doyle and herself in the last days of July or 1st of August, 1885, in reference to her husband and some bank-books, and that her husband was not present when they had that conversation. She was then asked this question : "State the conversation which you then had with William." This question being objected to, the counsel for the defendant stated that he intended to prove by the witness declarations of William Doyle to the effect that he had in his lifetime made a gift to the defendant of the money which the defendant was charged with misappropriating. The objection was sustained and the evidence excluded. This seems to have been material testimony upon the question which has already been suggested. Apart from the legal rights of the parties, it was necessary to establish upon the part of the prosecution a felonious intent upon the part of James Doyle in the drawing and using of this money. If William Doyle had attempted to make a gift of this money to James Doyle, and James Doyle had innocently believed that such gift had been made and had acted upon that belief in the drawing of the money, then the felonious intent necessary to make a crime would be absent, even though, as against the heirs of William Doyle, the gift may have been ineffectual. Whether such a gift could be effectual or not it is not necessary to determine. The evidence certainly was pertinent upon the question of the intent with which James Doyle possessed himself of this money, and he should have had the benefit thereof.

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Upon the whole case, therefore, we think that the conviction should be reversed and a new trial ordered.

BARRETT, J., concurred.

BARTLETT, J. :

I concur upon the first point discussed in the opinion.

Judgment reversed and new trial ordered.

**WILLIAM M. HALL, APPELLANT, v. SUSAN L. ROBERTS
AND JOHN F. PATTERSON, AS SURVIVING EXECUTORS OF
MARSHALL O. ROBERTS, DECEASED, RESPONDENTS.**

Agreement to pay on the sale of a vessel and to give notice of the sale — when the statute of limitations begins to run.

An action was brought, on August 2, 1888, to recover upon a written obligation, in which the defendants' testator admitted himself to be indebted to the plaintiff in the sum of \$80,000, which was to be due and payable when the steamship "Illinois" should be disposed of by sale, gift or loss, the agreement stating that said sum should not be "due or payable until a sale and transfer of the said steamship Illinois is perfected, in which event I hereby promise and agree to notify said Hall of her disposal, and within ten days thereafter to pay the full amount." A sale of the vessel took place in 1864, about eight months after the contract was made, of which the plaintiff was not informed until in 1887, although inquiries had been made of the testator, in respect thereto, prior to his death in the year 1880.

Held, that the money was neither due nor payable until the expiration of ten days after the plaintiff had received notice of the sale of the vessel; and that the statute of limitations did not begin to run until the plaintiff ascertained, in 1887, that the vessel had been sold.

APPEAL by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 8th day of April, 1890, dismissing the plaintiff's complaint after a trial at the New York Circuit.

The action was brought to recover under an agreement of which the following is a copy :

"Know all men by these presents. That I, Marshall O. Roberts, of the City, County and State of New York, hereby acknowledge myself indebted to William M. Hall of Brooklyn, Kings county, and State of New York, in the sum of thirty thousand dollars, which

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amount will be due and payable to the said Hall, his heirs, executors or assigns, when the steamship Illinois of twenty-five hundred tons burthen, which is in the market, shall be disposed of by sale, gift or loss, and which is held by me to sell and dispose of, and from the proceeds to pay said Hall the amount above named, and

“It is agreed and understood between the aforesaid Roberts and Hall, that neither the whole or any part of the above sum of thirty thousand dollars, will be due or payable until a sale and transfer of the said steamship Illinois is perfected, in which event I hereby promise and agree to notify said Hall of her disposal, and within ten days thereafter pay the full amount in the lawful currency of the United States as stipulated above.

“MARSHALL O. ROBERTS. [SEAL.]

“Witness :

“THEODORE E. TOMLINSON,

“New York, February 10th, 1864.

“[U. S. Int. Rev. Stamp.]”

George F. Betts, for the appellant.

Almon Goodwin and John Yard, for the respondents.

BRADY, J. :

This action was brought to recover the sum of \$30,000, with interest, upon a written obligation, in which Marshall O. Roberts, the defendants' testator, admitted himself indebted to the plaintiff in the sum mentioned, and which was to be due and payable when the steamship Illinois, of 2,500 tons burthen, should be disposed of by sale, gift or loss, and which he held to sell and dispose of, and from the proceeds pay the plaintiff the amount named. But in that instrument it was agreed between Messrs. Roberts and Hall that neither the whole nor any part of the sum mentioned should be due and payable until the sale and transfer of the steamship was perfected, in which event Roberts promised and agreed to notify Hall of her disposal, and within ten days thereafter pay the full amount in lawful currency of the United States, as stipulated.

It was conceded on the trial that this action was not commenced until the 2d of August, 1888. After the learned counsel for the plaintiff had presented in his opening the facts and circumstances attending

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and surrounding the claim the defendants moved to dismiss the complaint. The motion, after the admission stated, was predicated of the counsel's opening, from which it appeared that Mr. Roberts had died in the year 1880; that the plaintiff had made inquiries of him as to the sale of the vessel, and that Mr. Roberts had denied that the vessel was sold; but that after the death of Mr. Roberts he had employed persons to ascertain whether the Illinois was sold but was unable to obtain information until 1887, when he learned from Mr. Patterson, an executor of Mr. Roberts, that it had been sold in 1864, about eight months after the contract was made, and, further, that the bill of sale was not registered nor recorded in the custom-house until 1865. It thus appears that up to the year 1880 inquiries were made by the plaintiff of Mr. Roberts as to the sale of the vessel, but that no information of that circumstance was given him, and that he did not learn of the sale of the vessel until 1887, less than two years prior to the commencement of this action, and notwithstanding that he had employed persons to discover whether the sale had or had not taken place.

When the motion to dismiss the complaint was made, and after the admission which has been referred to, the learned justice presiding asked the counsel for the plaintiff if he had any acknowledgment in writing or any evidence, further than that he had stated, to take the cause of action out of the operation of the statute of limitations; and his answer was "No, sir," whereupon the motion was granted and the plaintiff duly excepted.

It will be observed, upon an examination of the agreement, that neither the whole nor any part of the sum of \$30,000 to be paid, should become due or payable until the sale and transfer of the vessel was perfected, and until within ten days after the notification of such sale by Mr. Roberts, a notification which was never given; and, therefore, the statute of limitations had not begun to run under the terms of the contract. The money was neither due nor payable until the expiration of ten days after the notification mentioned. This was not only an appropriate but a very reasonable provision in the agreement, inasmuch as it appears from a previous part of it, that the vessel was held by Mr. Roberts to sell and dispose of, and he was to pay to the plaintiff from the proceeds of the sale, if one were made, the sum mentioned in the agreement.

The conclusion expressed, as to the notice to be given, seems to be a very plain proposition, although no authorities have been found upon the precise question presented. The nearest approach to it that has been found is the case of *Keller v. The West, Bradley & Cary Manufacturing Company* (39 Hun, 348). There it appeared that the defendants were to render an account on or before the tenth day of each and every month, and that the payments should be made within ten days after the making of such return, the account relating to the number of pounds of wire hardened and tempered by the use of a patented invention. The returns were made regularly down to and including the 30th of September, 1871, but from that day to the 24th of August, 1872, no returns were made as contemplated, and they were refused, although the use of the invention was continued. The action was commenced on the 22d of August, 1878, and the statute of limitations was interposed as a defense. It was rejected, however, upon the ground that the omission of the defendant to render monthly accounts for the period mentioned prevented the running of the statute against its obligation to make the payments within ten days after making the returns, inasmuch as no returns having been made, the period of ten days had not been set in motion; the statute had at no time commenced to run and could not, under the agreement, as long as the returns were not made.

There is no difference in principle between that and the present case. Here no part of the \$30,000 could become due and payable until the expiration of ten days after notice of the sale of the vessel by Mr. Roberts, in whose custody the ship was placed for that purpose, and the plaintiff had a right to rely upon Mr. Roberts' performance of the contract in accordance with its terms. He seems, however, to have been more vigilant than the contract required, inasmuch as he made frequent inquiries of Mr. Roberts from the time of the making of the agreement until 1880, and, it would seem, up to the death of Mr. Roberts, as to whether or not a sale had been accomplished, and was advised by him that none had been made.

In the one case there were no returns made, and consequently the statute did not apply; in the other no notice was given, and the statute, therefore, did not commence to run. As already stated, we can discover no difference in principle between the cases.

The learned counsel for the respondents seems to think that the

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decision of the question in regard to the statute of limitations was not concurred in, in that case, by a majority of the court ; but this is an error.

The learned counsel for the appellant has urged upon the consideration of the court the doctrine of estoppel, and has cited a number of cases bearing upon the misleading statements of Mr. Roberts, and also upon the proposition that the statute of limitations has no application to this case, for the reason that Mr. Roberts was the trustee of an express trust. It is not, however, deemed necessary to proceed to the consideration of either of these propositions, and for the reason stated. The statute of limitations did not begin to run, at most, until Mr. Hall ascertained, namely, in 1887, that the vessel had been sold, the obligation to give notice resting upon Mr. Roberts and his representatives. The statements made in regard thereto are binding upon the defendants because the dismissal of the complaint was made upon the opening of the counsel for the plaintiff, which contained a statement of the facts and circumstances creating the claim, and characterizing and explaining the delay in the bringing of the action. The case is one which should have been submitted to the jury.

The dismissal of the complaint was, therefore, erroneous, and the judgment must accordingly be reversed and a new trial ordered.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Judgment reversed and new trial ordered.

MAX FRANKEL, RESPONDENT, v. JOHN B. WATHEN, APPELLANT, IMPLEADED WITH OTHERS.

Principal and agent — what disclosure required of an agent acting for both the parties to a bargain — commissions of an agent — account stated — when the minds of a principal and agent do not meet as to the latter's commissions.

In an action brought to recover commissions alleged to have been earned by the sale of whiskies, it appeared that the plaintiff, while acting as the general agent of the defendants in the sale of whiskies, was requested by the firm of Cook & Bernheimer to negotiate the exchange of a clay farm, owned by them, for whiskies. The plaintiff called the attention of the defendants to the farm,

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and an exchange was finally effected through his agency. The whisky was thereupon delivered and the defendants agreed to allow the plaintiff \$1,000 for his commissions in this transaction, which amount was charged on the plaintiff's books to the defendants' firm, and was included in an account rendered by him, which was received without objection by the defendants, and the amount thereof paid to the plaintiff by a remittance made prior to November 1, 1886.

It appeared that the plaintiff had also obtained a commission of \$250 from Cook & Bernheimer for selling the farm, a fact which he had concealed from the defendants.

Held, that although an account stated is *prima facie* evidence, and will be deemed conclusive evidence of its correctness, between the parties, unless some fraud, mistake, omission or inaccuracy is shown, yet the converse of the rule is equally well established, namely, that if fraud be shown, the account loses its conclusive character and is subject to re-examination.

Where an agent is acting in a double capacity, representing two persons, for each of whom he is expected to do his best, a knowledge by the principals of his duplicate character should be established, not by mere inference, but by evidence of a full disclosure or positive proof of knowledge, so that the seller or the buyer, as the case may be, may be advised of the exact relation of the agent to the other parties to the negotiations.

Where a principal authorizes his agent, by letter, to sell certain property on condition that he waits for a time for his commissions, and the agent writes to his principal refusing to wait for his commissions, and the sale is made, the principal may enforce the condition as to the time of payment of the commissions.

APPEAL by the defendant John B. Wathen from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 12th day of November, 1889, after a trial before a referee, who reported in favor of the plaintiff.

J. L. Bennett, for the appellant.

Ferdinand Kurzman, for the respondent.

BRADY, J. :

This action was brought to recover commissions earned by the sale of whiskies, and also for services in superintending a farm belonging to the defendants, and for various sums of money laid out and disbursed for them and loaned and advanced to them, all of which they promised to pay. The plaintiff also alleged that from time to time he had rendered an account to the defendants, copies of which are annexed to the complaint, upon which the defendants made various payments. He also alleges that the items charged in the account are true and correct in all respects.

The defendants denied any knowledge or information sufficient to form a belief that any of the work, labor or services were rendered for J. B. Wathen & Bro., or for the defendants in this action, or that any of the sums disbursed were expended other than as alleged or mentioned in the answer for the defendants or for J. B. Wathen Bros. & Co. or J. B. Wathen & Bro., but, on the contrary, alleged, on information and belief, that the liquors mentioned in the complaint were the property of and belonged to a corporation duly organized under the laws of the State of Kentucky, and known by the corporate name of the J. B. Wathen & Bro. Co., and that all the services rendered by the plaintiff, mentioned or referred to in the complaint, were done or performed for the corporation, and that all the moneys expended by the plaintiff were expended for and in doing business for the said corporation, and not otherwise, as the plaintiff at all times well knew; but whether all the services for which charge is made or what part thereof were rendered, or whether, or what part of the disbursements therein were charged, the defendants denied any knowledge or information sufficient to form a belief. The defendants, further answering, alleged, as a separate defense, on information and belief, that the claims and demands of the plaintiff, and all of them set out in the complaint, against the defendants and against the corporation had been fully paid. The defendants, further answering, set up counter-claims, on information and belief, arising from money advanced to the plaintiff and for property of the defendants in the hands of the plaintiff; and the whole answer, from supposed inconsistencies, is criticised by the learned counsel for the respondent as an old device, suggestive of the hunter so aiming his rifle as to hit the animal in the bushes if it was a deer and to miss it if it was a calf.

The question presented *in limine*, however, is whether the services were rendered to the firm of John B. Wathen & Bro., or the corporation named John B. Wathen & Bro. Co. It is conceded that there was a firm in Louisville designated J. B. Wathen & Bros., which began business in 1875 and which was continued until 1885, when it is insisted it was merged in a corporation under the laws of the State of Kentucky, known by the corporate name of the J. B. Wathen & Bro. Co.

There does not seem to be any doubt that the asserted change took place, but the firm and the corporation, nevertheless, seem to have gone along *pari passu* together, so far, at least, as the plaintiff is concerned, a circumstance which arose doubtless, in part at least, from the fact that J. B. Wathen was the president of the company, inasmuch as he was not advised of the merger asserted, and which it may be said actually took place. His contract was made with the firm, and not with the corporation, and was so continued, the evidence to establish which is abundant, and, therefore, justifies the finding of the referee, although there are some facts and circumstances, perhaps, bearing upon the asserted knowledge of the plaintiff that this change had taken place, but not at all sufficient to overcome the correspondence and other facts and circumstances proven and employed for the purpose of establishing the plaintiff's ignorance of the change. And it may be said that a perusal of the testimony creates the impression that the affairs of the corporation were so conducted, Mr. J. B. Wathen being the principal active person in both; that the firm was continued as a distinct organization in its relations with the plaintiff. The referee has so found and invoked, on behalf of the plaintiff, the proposition well established by authority, that the dissolution of a firm, its discontinuance, or any change in its character, will not affect persons dealing with the copartnership, unless actual notice be given. (See Bates on Partnership, §§ 890, 611; *National Shoe and Leather Bank v. Herz*, 89 N. Y., 629; *American Linen Thread Co. v. Wortendyke*, 24 id., 550.) On this subject the referee, in speaking of certain letters that were signed J. B. Wathen & Bro. Co., and which he justly says refer to a corporation of that name, observed as follows: "The striking fact, however, appears, that throughout this long correspondence, the defendant John B. Wathen gave no distinct notice to the plaintiff of the organization of a corporation or of any change in his business, nor direction of any kind to charge any other concern or corporation, except what might be inferred from the signing of letters, and, in May, 1887, the denial that Mr. Bond was vice-president of the company." There was, in other words, no such proof on the subject as would necessarily require the plaintiff to look upon his employers as others than the members of the firm, and thus, by a proper legal notification, be required to sever his connection with it.

The referee further says: "It must be found as a matter of fact that the defendant Wathen represented himself to be engaged in business under a firm name; that such representation was made in such a manner as to induce the plaintiff to rely upon it; the plaintiff did rely upon it, and, as a conclusion from the facts, it must be held that he is estopped from denying the copartnership." This, however, is a mere reiteration of the fact in a different form that the plaintiff was not aware of the change which was made, had received no legal notice of it, and, therefore, was not concluded by it, or his right in any way affected by it to the compensation for the services rendered to the firm, as he understood it to exist.

The defendants have made a gallant struggle against the effect of the evidence and the rule of law suggested, but in vain. On that issue the referee must be sustained.

The general liability of the defendants having been thus established, the referee proceeded to examine the claims of the plaintiff which were disputed, namely, the commission for the sale of 2,500 barrels of whisky to Cook & Bernheimer in exchange for a clay farm owned by them, the alleged sales of "Criterion" whisky in Philadelphia by the plaintiff, the compensation for his services in managing the farm mentioned, and commissions for the sale of 1,000 barrels of whisky to Cook & Bernheimer in exchange for the yacht "Sea Witch."

As to the first, namely, the sale of 2,500 barrels of whisky in exchange for a farm, it appears that the plaintiff, while acting as the general agent of the defendants for the sale of their brands of whiskies within the limits prescribed, was requested by Cook & Bernheimer to negotiate the exchange of a clay farm owned by them for whisky. He called the attention of the defendants to the farm, and the exchange was finally effected through his agency. The whisky was thereupon delivered, and the defendants agreed to allow the plaintiff \$1,000 for his commission in this transaction, which amount was charged on the plaintiff's books to the defendant's firm and included in an account rendered by him, and which was received without objection by the defendants, and the amount thereof paid to the plaintiff by the remittance made prior to November 1, 1886. The correctness of the item was not disputed until the trial of the action, although the defendant insisted that the corporation of

J. B. Wathen & Bro. Co., and not he, was subject to the liability, if any. It was disputed upon the ground that the plaintiff had obtained a commission of \$250 from Cook & Berheimer for selling the farm, a fact which he concealed, and was, therefore, guilty of such misconduct and fraud as to forfeit his rights to any commission from the defendant, who thus, even if there was an account stated, established his right to open it.

It is true that an account stated is *prima facie* evidence, and will be deemed conclusive between the parties unless some fraud, mistake, omission or inaccuracy is shown; but the converse of the rule is equally well established, namely, that if fraud be shown the account loses its conclusive character and is subject to re-examination and a contest. The learned referee, however, arrived at the conclusion that the defendant knew, whilst the transaction was going on in reference to the farm, that the plaintiff was also acting as the agent of Cook and Bernheimer, and was, therefore, not subject to the rule clearly stated in the case of *Gardner v. Ogden* (22 N. Y., 347), that where a person stands in the inconsistent relations of both buyer and seller, there are dangers, and it is not relevant to say that it is impossible there could be any in a particular case. And, as said by Lord CRANWORTH and quoted in that case: "An agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this rule adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into." And, further: "It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still so inflexible is the rule that no inquiry on that subject is permitted."

In the case of *Clafin v. The Farmers and Citizens' Bank* (25 N. Y., 297) Judge SMITH says: "The rule is applicable to all persons standing in a trust relation. The principal is entitled to the exercise in his behalf of all the skill, industry and ability of his agent,

and to his intensest fidelity to his trusts." The same question was discussed in *Murray v. Beard* (102 N. Y., 508), by Justice FOLGER, who, in the course of his opinion, said: "An agent is held to *uberrima fides* in his dealings with his principal, and if he acts adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services." The question in such cases does not, therefore, turn upon the point of whether there is any intention to cheat or not, but upon the obligation arising from the fiduciary relations of the parties to make a frank and full disclosure. (Story's Eq. Jur., § 316; see, also, *Martin v. Bliss*, 57 Hun, 157, a distinctive case on the subject.)

The rule governing the subject suggested is, therefore, so strict and so vigorous, so sensible and so just, that when the person is acting in the double capacity of representing two persons, for each of whom he is expected to do his best, a knowledge of the duplicate character should be established, not upon mere inference, but upon a full disclosure or positive proof of knowledge, so that the seller or the buyer, as the case may be, may be advised of the exact relation of the agent to the parties conducting the negotiation. There is no such evidence in this case. At most, there is a mere suggestion that Cook & Bernheimer relied upon the plaintiff's judgment as to the selection of the whisky which was to be given for the farm. This, said the learned referee, "is some evidence of the fact that Mr. Frankel was employed by Mr. Cook to negotiate the exchange, and that Cook & Bernheimer relied upon his judgment and skill in the transaction." There is no pretense that there is anything more than an intimation, inferentially arising, that the defendants knew that Cook & Bernheimer were to compensate the plaintiff for his services in securing the exchange. For these reasons it is thought that the referee was in error in all his views affecting the commission of a thousand dollars, which was to have been paid to the plaintiff for the exchange which has just been considered. It should have been rejected in every aspect in which it may be legally considered.

An examination of the case has resulted in the conclusion that the commission on the sales of "Criterion" whiskies in Philadelphia,

the facts and circumstances relating to which were elaborately considered by the referee, should be allowed as found by him. The third disputed item, namely, the claim for services in managing the farm, was found against the plaintiff, and, therefore, requires no consideration. The last item in dispute, namely, the commissions for the sale of 1,000 barrels of whisky for Cook & Bernheimer, in exchange for the yacht "Sea Witch," allowance of which was made by the referee, had not been earned at the time this action was commenced. On the subject of this exchange, which embraced not only the yacht mentioned but Southern lands, a correspondence had taken place between the parties' which resulted in Mr. Wathen's writing a letter to the plaintiff in relation thereto, and in which he said: "If you make a trade on the basis of a thousand barrels, we should expect you to wait for your commissions until we can realize something on the yacht." That letter was dated the 15th of November, 1886, and written from Louisville, Kentucky. On the eighteenth of November the plaintiff wrote to the defendant Wathen stating, "Yours of the 15th to hand and noted," and it contains a statement of the proposition as it then stood, and further refers to the special arrangement in reference to the commission, saying: "In your letter you say that, in case the trade is consummated for only one thousand barrels, you will expect me to wait for my commission until the yacht is disposed of. Now, you know very well that I am not very particular. It was not until some time after the completion of last year's contracts that I commenced drawing on account of my commission, and, in fact, have not drawn it all yet, although on several occasions I required the money in my business; but I certainly hold that my commissions are due me immediately on the completion of contracts, although I may not always wish to draw on you for same at once, especially when you require funds yourself."

The learned referee in dealing with this question says the minds of the parties did not meet, and he, therefore, fails to find that the sale was effected on the express condition that the payment of commission should be deferred until the yacht was disposed of. It does not appear that the sale which was made was authorized by the defendants in any other mode than that suggested by the letter of November fifteenth, and which, in the ordinary course of mail, would have reached New York on the seventeenth of November,

two days after it was written, and which was, in fact, received by the plaintiff before the sale took place.

The testimony in regard to the transaction presents some features perhaps worthy of comment, but which it is not needful here to indulge in, the referee having placed his decision upon the proposition, as suggested, that the minds of the parties did not meet. The mind of the defendant must prevail here, and the letter containing the condition having been received prior to the sale, controls the claim of the plaintiff and limits his right of action for the commissions to the time of the sale of the "Sea Witch" or other disposition of her was made. His right of action did not accrue until that event occurred, unless the defendant acted collusively, or designedly delayed the sale or disposition of the vessel beyond a reasonable time.

The result of this review is, therefore, that the judgment appealed from must be modified by striking out the recoveries of the commissions allowed for selling the farm and the "Sea Witch," and affirmed for the balance, without costs to either party.

DANIELS, J.:

I concur except in the result. There should be a new trial unless the plaintiff shall stipulate to deduct the items concluded to have been erroneously allowed by the referee. And in case of the service of such stipulation then the judgment as thereby modified should be affirmed, without costs of the appeal.

VAN BRUNT, P. J.:

I concur in modification suggested by Judge DANIELS.

Judgment modified, as stated in opinion, and as modified affirmed, without costs of the appeal.

MARY E. WITTY, APPELLANT, v. THOMAS C. ACTON AND
ALPHONSO S. SHERWOOD, RESPONDENTS.*

Landlord and tenant — right of a tenant, evicted for non-payment of a tax, to tender payment of the tax and be restored to possession under section 2256 of the Code.

A tenant who has been removed from the demised premises, after a default in the payment, for sixty days after the same became payable, of any taxes or assessments upon the demised premises which he had agreed to pay, cannot avail himself of the provisions of section 2256 of the Code of Civil Procedure, which allows the tenant, at any time within one year after the execution of the warrant, when the unexpired term of the lease exceeds five years, to pay or tender to

*The following opinion was delivered at Special Term:

INGRAHAM, J. The complaint alleges the making of a lease of certain premises in the city of New York, on the 31st of March, 1881, by defendant Acton to plaintiff for a term of twenty-one years, whereby plaintiff was to pay certain rent in equal quarterly payments, and further promised and agreed to pay "all duties, taxes and assessments" as should be imposed on the said premises.

That plaintiff paid the rent until February 1, 1887, and that on the 9th of March, 1887, the agent of the defendant applied to one of the District Courts of the city of New York to remove the plaintiff, and presented his petition claiming that there was due to him from the plaintiff the sum of \$275, balance of rent from February 1 to May 1, 1887, and that the taxes levied on said premises for the years 1881, 1884, 1885 and 1886, had not been paid by the plaintiff; that payment of said rent and taxes had been demanded of the plaintiff.

That such proceedings were had that on or about the 21st day of March, 1889, a final order was made by the said District Court, awarding to the plaintiff the possession of the said premises; that subsequently a warrant was issued by the justice of said District Court for the removal of all persons from said demised premises, and to put the defendant Acton in possession thereof, which warrant was executed, and that subsequently plaintiff tendered to defendant Acton all rent of said premises in arrear under said lease at the time of such tender, with interest thereupon as well as taxes theretofore levied upon said premises at the time of such tender remaining unpaid, and all costs and charges incurred by defendant Acton, and the complaint demands judgment for the possession of the premises and damages for the detention thereof.

The proceedings for the removal of the plaintiff from the demised premises were taken under section 2231 of the Code. This section provided for the removal of a tenant for five separate causes. Subdivision 2 provides for the removal of a tenant when he holds over and continues in possession of the demised premises without the consent of his landlord after a default in the payment of rent, and subdivision 3, for such removal when in any city in this State the tenant holds over after default, for sixty days after the same shall be payable, in the payment of any

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the landlord all rent in arrear at the time of the payment or tender, with interest and the costs and charges incurred by the landlord, and thus restore himself to the possession of the premises and the advantage of his lease.

APPEAL by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 3d day of April, 1890, with notice of an intention to bring up for review, upon such appeal, an interlocutory judgment, entered in said clerk's office on the 13th day of March, 1890, sustaining the demurrer of the defendants to the plaintiff's amended complaint, as further amended, *nunc pro tunc*, as of December 5, 1889, by an order entered on February 26, 1890.

The action was brought to recover the possession of certain

taxes or assessments levied on such demised premises which he has agreed in writing to pay.

By section 2285 it is provided that the applicant must present to the judge or justice a written petition stating the facts which, according to the provisions of the Code, authorize the application by the petitioner and the removal of the person in possession.

It is clear that the application set out in the complaint was founded on both the subdivisions of section 2231 of the Code, above cited, for the petition states facts which authorize the removal of the plaintiff from the possession of the premises under either of such subdivisions. If the defendant had failed to prove the allegations as to the rent, and did prove the allegation as to the taxes, there could be no doubt but that the justice would have been justified in issuing the warrant. The warrant was issued, and thereupon the lease was canceled, and the relation of landlord and tenant was annulled (Code, § 2253), and this plaintiff's interest in the premises and her right to possession thereof ended, and, on the facts alleged in the complaint, plaintiff has no cause of action, unless she is entitled to the possession of the demised property, under the provisions of section 2256 of the Code. But I do not think that the terms of that section apply, for it is only where the special proceeding is founded upon an allegation that a lessee holds over after a default in the payment of the rent that the lessee may pay or tender all rent in arrear at the time of the payment or tender, and on a tender of the rent the tenant to be allowed to resume possession of the premises. There is no provision for the tender of the amount due for taxes and assessments, and if plaintiff is entitled to the benefit of the section, she has it on a tender of the rent due and interest, and the costs and charges without a tender of the amount due for taxes and assessments.

As before stated, this proceeding was founded upon the non-payment of the taxes as well as upon the non-payment of the rent, and it was not thereafter a proceeding "founded upon an allegation that a lessee holds over after a default in the payment of the rent."

Two causes to justify the removal were set forth in the petition, either of which

premises in the city of New York, and damages for the withholding of the same.

J. Sabine Smith, for the appellant.

George Bliss, for the respondents.

BRADY, J. :

The question presented by this appeal is whether a lessee removed from the demise, as a tenant holding over without the permission of the landlord, after default in the payment of the rent due pursuant to the agreement under which the demised premises are held

would justify the relief granted, and in such a case it cannot be said that the proceeding is founded on either one.

That the legislature did not intend that the tenant should be allowed to redeem when he had been removed for the non-payment of taxes and assessments, is apparent from a comparison of section 2254 with the sections above cited. It is in section 2254 provided that a tenant may secure a stay of the execution of the warrant on payment of the amount of the rent due, or of such taxes or assessments and interest and *penalty*, or by giving an undertaking as therein provided. This section was amended to bring it into harmony with the amendment to section 2231, and the failure of the legislature to amend section 2253 at the same time is clear evidence that it was not intended that that section should apply when the tenant was removed for the non-payment of taxes and assessments.

The plaintiffs seek to attack the constitutionality of the amendment to section 2231 of 1885. The right of the plaintiffs to redeem is not at all affected by that amendment. Plaintiff has the same right to redeem now that she had before the passage of the act amending the Code. If the amendment authorizing the court to dispossess for non-payment of taxes was unconstitutional, that question should have been settled in the proceeding in which relief was asked because of such non-payment.

By the issuance of the warrant in that proceeding it was adjudged that plaintiff was entitled to the relief granted, and it is now too late for plaintiff to claim that she could have successfully defended that proceeding.

But it is clear that the act was not in conflict with any constitutional provision. It simply affected the remedy given to the landlord on a breach of the covenant in the lease. By the lease the landlord had a right to re-enter on breach of the covenant to pay taxes, etc. Whether he was to obtain that right of re-entry by an action of ejectment, or by proceedings under the provisions of the Code above cited, was a question within the control of the legislature.

On the argument counsel for the defendant expressly waived the point as to the sufficiency of the allegation as to the tender, and I have, therefore, considered the right of the plaintiff to the relief asked for, and have come to the conclusion that plaintiff cannot, on the facts pleaded, obtain possession of the premises. The complaint does not, therefore, state facts sufficient to constitute a cause of action, and the demurrer must be sustained.

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and a demand thereof, and who also holds over under like circumstances, after a default in the payment for sixty days from the time the same shall be payable of any taxes or assessments which the tenant has agreed to pay, can avail himself of the provisions of section 2256 of the Code, which allows the tenant at any time within one year after the execution of the warrant, when the unexpired term of the lease exceeds five years, to pay or tender the landlord all rent in arrear at the time of the payment or tender, with interest and the costs and charges incurred by the landlord, and thus restore to himself the possession of the premises and the advantage of his lease.

The learned justice in the court below has considered this subject fully, and has expressed his views in an elaborate opinion (note, *ante*, p. 552), which embraces and satisfactorily disposes of the whole controversy in that regard, and although additional views might be indulged, it is deemed unnecessary to employ them, but to leave the affirmance of the judgment upon the opinion which he has delivered.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Judgment affirmed, with costs.

ROYAL E. DEANE AND GEORGE G. BROOKS, RESPONDENTS, v. JOHN A. LOUCKS, APPELLANT.

Opening a judgment entered by default—what proof of good faith required—a recovery for work done and materials furnished is a bar to a claim for defective work and materials.

On an application to open a default the applicant must not only show a reasonable ground for opening the default, but the burden is upon him to establish his good faith otherwise than simply by making an affidavit of merits.

A judgment by default, in an action to recover for work, labor and services and for materials furnished, is a bar to any action by the defendant for damages because of defective work or materials.

APPEAL by the defendant John A. Loucks from an order of the Supreme Court, made at Special Term under date of June 16, 1890, and entered in the office of the clerk of the county of New York,

which order denied the defendant's motion to open a default to appear or answer in the above-entitled action, which was commenced by the service of a summons upon him, and to set aside the judgment which had been entered against him by default.

Brunnemer & Bennett, for the appellant.

E. C. Stone, for the respondents.

VAN BRUNT, P. J.:

We think that the learned counsel for the appellant is entirely mistaken in supposing that the doctrine has ever been established that when an affidavit of merits is presented and there are no suspicious circumstances connected with the application a default will necessarily be opened. Although decisions to that effect may be found, yet still the practice of the court has been against so loose a procedure as this; and the applicant must not only show a reasonable ground for opening the default, but the burden is upon him to establish his good faith otherwise than simply by an affidavit of merits.

If there were nothing but this in the case at bar, we would think that the order appealed from was correct. But, upon an inspection of the record, it appears that the learned judge was influenced largely in coming to the conclusion at which he arrived, by the consideration that although the default was held, the defendant could maintain an action for the same cause desired to be set up in the counter-claim in the proposed answer. The action was brought to recover for work, labor and services and for material furnished which was alleged to be of the reasonable value of a certain sum. The defense sought to be interposed was that the work and labor was done and the materials furnished under a written agreement containing certain stipulations, and that such stipulations were not complied with, and in consequence of the defective workmanship and defective materials the defendant had suffered damage to a large amount.

It is well settled that a recovery upon a complaint of this description is a bar to any action for damages because of defective work or materials. See *Gates v. Preston* (41 N. Y., 113), in which it was held that a judgment by default in favor of a physician for professional services is a bar to any action by the defendant against him for

malpractice in the performance of such services. And the principle there laid down is recognized in *Goebel v. Iffla* (111 N. Y., 171). The reason of the rule is manifest, because a recovery by the plaintiff upon the ground that the services were worth the amount alleged in the complaint is absolutely inconsistent with the claim that the services were worthless and were detrimental to the defendant.

So in the case at bar, if the plaintiff's work, labor and materials were worth the amount set out in the complaint, then the defendant could have no cause of action because of defective materials and workmanship.

We think, therefore, that the default should have been opened in order to enable the defendant to put in his counter-claim upon payment of the costs of all proceedings before notice of trial, the disbursements in the entry of judgment and ten dollars costs of the motion.

The order should, therefore, be reversed, with ten dollars costs and disbursements; and the default opened upon the conditions above mentioned, the costs to be offset against each other so far as practicable.

BARTLETT and BARRETT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements; and default opened on payment of costs of all proceedings before notice of trial, the disbursements in the entry of judgment, and ten dollars costs of motion, the costs to be offset against each other so far as practicable.

PANAMA RAILROAD COMPANY, RESPONDENT, v.
RICHARD L. JOHNSON, APPELLANT.

Complaint for embezzlement and fraudulent misapplication of money — proof required of the plaintiff — exception to a charge to the jury bringing in a sealed verdict.

In order to recover, in an action in which the defendant is charged to have embezzled and fraudulently misapplied the plaintiff's money while acting as its agent, it is necessary for the plaintiff to establish, not only the receipt of the money by the defendant, but its embezzlement or fraudulent misapplication by him; and the burden of proof during the whole progress of the trial rests upon the plaintiff to establish those two propositions.

An entirely different rule prevails in an action for money had and received.

A defendant has a right to take exceptions to the charge of the court, at the time when the jury bring in a sealed verdict, they having been allowed to separate.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 3d day of February, 1890, in favor of the plaintiff, for the sum of \$2,319.30; and also from an order, entered in said clerk's office on the 28th day of January, 1890, denying the defendant's motion for a new trial made upon the minutes of the court, after a trial at the New York Circuit before the court and a jury.

H. C. Willcox, for the appellant.

T. S. Moore, for the respondent.

VAN BRUNT, P. J. :

This action was brought to recover the sum of \$5,200 alleged to have been received by the defendant as agent of the plaintiff, and to have been by him embezzled and fraudulently misapplied.

Upon the trial evidence was introduced to show the receipt by the defendant of the sums of money referred to in the complaint. The defendant denied the embezzlement and misappropriation, and offered proof in support of such denial. The jury rendered a verdict showing that they found in favor of the defendant upon one item charged against him and in favor of the plaintiff upon two other items. And from the judgment thereupon entered and from the order denying a motion for new trial this appeal is taken.

It seems to have been assumed upon the trial that the complaint was sufficient to justify proof, under section 549 of the Code, that the money received by the defendant had been embezzled and fraudulently misapplied while he was acting in a fiduciary capacity. Without in any way assenting to this proposition, we will consider some of the exceptions which were raised during the progress of the trial, assuming the complaint to have been sufficient to charge the defendant as above stated. There was no question raised upon the trial but that the defendant had received the sums of money charged in the complaint, and the question submitted to the jury was whether he had embezzled or fraudulently misapplied the same.

In order for the plaintiff to succeed it was necessary that it should establish, to the satisfaction of the jury, not only the receipt of the

money, but its embezzlement or fraudulent misapplication by the defendant, and the burden of proof rested during the whole progress of the trial upon the plaintiff to establish these two propositions. If this had been an action for money had and received to the use of the plaintiff, and it had been tried upon that theory, then all that the plaintiff would have had to have done would be to show that the defendant had received the money, and the burden would then have been upon the defendant to have shown that he had either paid the money to the plaintiff or applied the same to its use.

We think the distinction between the two kinds of action was entirely lost sight of during the progress of the trial, and that the learned court erred when it charged the jury, that it having been shown that the defendant had received the two items for which they found a verdict in favor of the plaintiff, it was incumbent on the defendant to show by a preponderance of evidence that he had paid the money over to the benefit of the company. In order to charge an agent with embezzlement, it is necessary not only to show that he has received the money, but also that he has refused to pay the same upon demand or that he has misapplied the same; and the burden of establishing these propositions rests upon the plaintiff notwithstanding the admission of the defendant that he received the moneys claimed to have been embezzled. In other words, in an action for embezzlement or misapplication of money by an agent there is no such thing as a shifting of the burden of proof. The plaintiff must establish his whole case, and that case includes the establishment to the satisfaction of the jury of the embezzlement or misapplication of the money as well as its receipt. An entirely different rule prevails in an action for money had and received. There the same rule applies as in the case of every debtor, namely, that he is bound to show payment if he claims such a defense; an entirely different condition of circumstances from that which exists in an action like the present was assumed to be, namely, an action to recover for money embezzled by an agent acting in a fiduciary capacity.

The jury were erroneously instructed upon this point. It was an error which was of vital importance to the defendant. The importance of this question is shown by the verdict of the jury, where they find in favor of the defendant upon the third item, as to which the

court charged that the burden of proof was all the time upon the plaintiff.

There was another question raised during the progress of the trial, and that was the right of the defendant to take exceptions when the jury brought in a sealed verdict, they having been allowed to separate. Such a right was claimed to be recognized by a provision of the Code, which is assumed to be a new provision enacted for the first time upon the adoption of the present Code.

It will be seen that that provision has existed ever since the adoption of the Revised Statutes, and, in view of its terms, we do not see how a party can be prevented from taking an exception expressly authorized.

The judgment and order should be reversed and a new trial ordered, with costs to appellant to abide event.

BRADY and DANIELS, JJ., concurred.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

TEXAS STANDARD COTTON OIL COMPANY, RESPONDENT,
v. MUTUAL FIRE INSURANCE COMPANY, APPELLANT.

Order that an answer be made more definite and certain — granted where the complaint alleges, generally, false representations to have been made by agents of a corporate plaintiff.

In an action brought by a corporation to recover upon a policy of insurance against fire, the answer alleged that an agreement, mentioned in the complaint, fixing the amount of the loss, was entered into by the defendant on the strength of and in reliance on false and fraudulent representations upon the part of the plaintiff as to the amount of the loss, and that false and fraudulent statements had been made by the plaintiff and its authorized agents to the defendant and its authorized agents.

Held, that the plaintiff was entitled to an order to have the answer made more definite and certain.

Whatever the rule may be as between individuals in this regard, where one of the parties is a corporation and acts by its trustees, officers and agents, such relief will be granted, as such a plaintiff cannot be expected to have in court every agent, officer and trustee upon the trial of any case in which an allegation of fraud may have been asserted.

APPEAL by the defendant, the Mutual Fire Insurance Company, from an order of the Supreme Court, made at Special Term in the city of New York, and entered in the office of the clerk of the county of New York on the 24th day of September, 1890.

Stine & Calmen, for the appellant.

Benno Loewy, for the respondent.

VAN BRUNT, P. J.:

This action was brought to recover the alleged loss of the plaintiff by fire on certain property insured by the defendant. The answer admits the issuing of the policies, denies the amount of the loss sustained, and alleged that the agreement mentioned in the complaint fixing the amount of the loss was entered into by the defendant on the strength of and in reliance upon false and fraudulent representations upon the part of the plaintiff as to the amount of the loss, and that false and fraudulent statements were made by the plaintiff and its authorized agents to the defendant and its authorized agents; and that all the agreements made were made in reliance upon such false and fraudulent statements. It also alleges that the fire by which the property of the plaintiff was destroyed or damaged was caused by the act, neglect or with the connivance of the plaintiff, or of parties interested in said property. The plaintiff thereupon moved to have the answer made more definite and certain; and the court ordered that said answer be made more definite and certain by inserting what false representations were made as to the amount of its loss and damage, and where and when and by whom made, and in what respects such statements were false and untrue; and also when, where and by whom a certain alleged agreement mentioned in the answer was entered into, and what the fraud or false swearing alleged by the answer consisted of, and by whom committed, and in what the alleged neglect of the plaintiff to use means to preserve the property at and after the fire consisted of, and what loss was sustained by reason thereof. And from such order this appeal is taken.

The ground upon which the appellant rests is, that the decisions of the courts of this State have been nearly unanimous (as he claims) that such a motion will not be granted where the plaintiff has all the knowledge on the question at issue in as full a measure as the defendant.

However applicable such a rule may be as to individuals, its stringency must necessarily be relaxed where one of the parties is a corporation and acts by its trustees, officers and agents; because such a plaintiff cannot be expected to have in court every agent, officer and trustee upon the trial of any cause into which an allegation of fraud may have been injected.

The allegations alleged to have been fraudulently made are stated in the answer to have been made by the plaintiff or its authorized agents. The plaintiff was entitled to know, before going to trial, by whom and when and where such representations were made, in order that it should have the individual present upon the trial, or that it might examine him in case he should be a non-resident of the State, to meet any proof which might be offered by the defendant upon the trial. The allegations in regard to what the representations were is absolutely indefinite, and conveys no notice to the party as to what it is charged with, and the plaintiff is entitled to know, with a reasonable degree of definiteness, what is the claim which the defendant will urge upon the trial, in order that it may make proper preparation to meet it.

It is a familiar principle that, where a party is charged with making fraudulent representations, that he knows whether or not he did make such false representations. But when a corporation is charged with having made false representations, it is impossible for it to determine what may be the course of proof upon the trial, and thus have the proper parties in court to refute the charges made against it. It is needless to go through the various portions of this order as to which relief has been granted, because the principle which controls one controls all.

We think that none of the objections to the order which have been urged before the court are well taken. But, in the affirmance of the order, we do not intend to support in its entirety the practice pursued upon this application, but simply to rule upon the questions which have been raised upon this appeal.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

BARTLETT and BARRETT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

IN THE MATTER OF THE APPLICATION OF THE METROPOLITAN ELEVATED RAILWAY COMPANY, RELATIVE TO ACQUIRING TITLE TO CERTAIN REAL ESTATE IN THE CITY AND COUNTY OF NEW YORK.

(IN RE WATSON AND OTHERS.)

Eminent domain—easement taken by an elevated railroad—value thereof not conclusively determined by a judgment granting an injunction, to become inoperative upon the payment of a specified sum.

In proceedings to condemn, under the exercise of the right of eminent domain, the easements, necessary for the operation of an elevated railway, in front of certain premises in the city of New York, the owners of the easement sought to be taken offered in evidence, before the commissioners appointed to make the appraisal of damages, judgments recovered in actions against the railroad by such owners to prevent the operation of the road. By these judgments an award of damages was made in each case, and the value of the easements was determined, and it was therein further provided, that upon payment of the sum mentioned in such judgments a conveyance should be executed by the owners thereof, and that the injunction, which was otherwise granted by such judgments, should in that event become inoperative.

Held, that the judgments were not decisive between the parties, upon the question as to the value of the easements sought to be taken, in the proceedings to condemn them, and were properly rejected by the commissioners.

APPEAL by John H. Watson and Mary E. Hughes from the appraisal and report made by the commissioners in the above-entitled matter, and filed September 4, 1889, and confirmed by the court at Special Term by an order dated September 5, 1889, and also from such order confirming such appraisal and report.

George Zabriskie and Edwin M. Felt, for the appellants.

Edward S. Rapallo and Alexander S. Lyman, for the respondent.

BRADY, J.:

These proceedings were commenced July 10, 1889, to condemn so much of the easements as were taken by the petitioner in the construction and operation of its road in West Fifty-third street, appurtenant to the premises known as 121 and 138 in that street, the former owned by John H. Watson and the latter by Mary E. Hughes, the appellants herein. The questions involved in each proceeding are the same.

In 1884 and 1887 actions were brought in the Superior Court of this city to recover damages resulting from the unlawful use by the company and their lessee of the easements and privileges appurtenant to the property of the respective persons named, which had been taken from them without compensation, and seeking the equitable interference of the court by enjoining the further use of these easements and privileges and the recovery of damages for the loss sustained. The plaintiffs were successful. An award of damages was made in each case, and the value of the easements determined, and provision in the judgments made, which was independent of the award of damages, that upon the payment of the sum mentioned in each judgment a conveyance of the easements and privileges should be executed, the prototype of the judgments being found in the case of *Henderson v. New York Central Railroad Company* (78 N. Y., 423). The company in this proceeding invoked the provisions of the general railroad act of 1850 (chap. 140), which was their right, and the appellants insisted that the judgments mentioned, in which their premises, respectively, were the subject of contention, were *res adjudicata* between them, and offered the judgments in evidence before the commissioners. They were rejected, and this was the proper disposition of them according to the decision in the case of Henderson already mentioned. It appears that damages were awarded in that case for an unauthorized appropriation of the property in question, and the value thereof having been ascertained the judgment also provided for the tender of a conveyance by the plaintiffs of their interest in the property in controversy.

The court said in that case that, in view of the annoyance and the expense incident to the stoppage of its trains, it was just to open the doors of escape and to permit the defendant at once to acquire title to the land occupied, and thus avoid the delay incident to other proceedings for that purpose, but that it was, notwithstanding, optional with the defendant to comply with the conditions; the plaintiff could not require it. And again, that if the company did not accept the conditions, and chose to proceed under the statute, the record of the judgment would prevent the allowance of any damages for injury to the land not actually taken, or for any cause covered by its provisions, and leave the defendant liable only

for those which may be assessed for the road-way. And this is a declaration that the provision in reference to the deeds contained in the judgments offered in evidence imposed no obligation whatever upon the company, and that they could accept those terms or not as they pleased. And the same doctrine seems to have been intimated, if not asserted, in *Story v. New York Elevated Railroad Company* (90 N. Y., 122). It may be further said that the right of the company to acquire the title to lands was not in issue in the actions mentioned, but was incidentally and equitably connected with the continuance or discontinuance of the injunction prayed for. The right to damages and the propriety of an injunction were the subjects litigated, and it may be the value, but only for the purpose of ascertaining the damages, and thus it was incidental. It was upon this theory, no doubt, that in the *Henderson Case* the suggestion of a deed was regarded as a proper exercise of equitable jurisdiction, though not compulsory upon the defendant, as a means of avoiding the necessity of proceedings to condemn the land under the statute, and at the same time affording full protection to the owner. No error was committed, therefore, before the commissioners. The petitioner's right to proceed under the railroad act mentioned was intact. The order below confirming the proceedings before the commissioners was, therefore, properly made and the appeal from it unavailing.

The order should be affirmed, with ten dollars costs and the disbursements of the appeal.

DANIELS, J., concurred.

Order affirmed, with ten dollars costs and the disbursements of the appeal.

ELIZABETH LAWTON AND ANOTHER, AS EXECUTORS, ETC., OF
SAMUEL GREEN, DECEASED, RESPONDENTS, v. SAMUEL G.
CORLIES AND OTHERS, APPELLANTS, THE WASHINGTON
TRUST COMPANY, RESPONDENT.

Will, directing that the estate "be divided among my heirs-at-law"—who entitled thereto.

A testator, by his will, provided as follows: "Secondly. I order and direct that my estate be divided amongst my heirs-at-law, in accordance with the laws of the State of New York, applicable to persons who die intestate."

Held, that, under this provision of the will, the real property left by the deceased passed to his heirs, in accordance with the statute of descent, and the personalty was to be distributed among the next of kin in accordance with the statute of distributions.

APPEAL by the defendants, Clara W. Corlies, Anne W. Corlies, Howard W. Corlies and Edmee A. Corlies, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 25th day of June, 1890, except so much thereof as orders, adjudges and decrees that the costs of the several parties to the above-entitled action be paid by the plaintiffs out of the estate of the said Samuel Green, deceased.

The action was brought to obtain a construction of the will of Samuel Green, the second item of which, in regard to which the uncertainty arose, is set forth in the following opinion:

Rufus L. Scott, for the infant defendants, appellants.

Wilson M. Powell, for the plaintiffs, respondents.

Charles H. Russell, for the Washington Trust Company, as committee, etc., defendant and respondent.

BRADY, J.:

The uncertainty which presents itself to the plaintiffs in the contemplated discharge of their duties arises upon the following clause in the will involved herein:

"*Secondly*. I order and direct that my estate be divided amongst my heirs-at-law in accordance with the laws of the State of New York, applicable to persons who die intestate, and that no bond or

security whatever be required of my executors hereinafter named, in the settlement and distribution of my estate, real or personal."

The will itself contains three clauses, the first the direction for his executors to pay his debts and funeral charges as soon as may conveniently be done; the second, the one already mentioned, and from which the uncertainty springs, and the last the one nominating and appointing his executors. There is nothing, therefore, in its contents, which throws light upon the intention of the testator, and his meaning must be determined from the form and substance of the will.

The learned justice in the court below thought there was no difficulty whatever in ascertaining the intention of the testator as expressed in the clause mentioned. He was of opinion that the design was to dispose of the property as if the deceased had died intestate both as to realty and personalty, and that the sole object in view in the making of the will was to secure the appointment of executors. It will have been observed that the direction of the intestate was that his whole estate should be divided, in accordance with the laws of the State of New York applicable to persons who die intestate, among his heirs-at-law, and the learned justice, upon a consideration of the subject presented, thought the natural and reasonable view to be that he meant his estate to be divided and distributed, according to its nature, as the law provided, in case he made no will, that is to say, that the realty, if any should follow the statute of descents as it exists in this State, and the personalty the statute of distributions, by the latter of which representation in collaterals would not extend beyond brothers' and sisters' children. Although many cases have been referred to, and the subject is susceptible of a considerable display of adjudications, it is nevertheless thought that the decision in the case of *Woodward v. James* (115 N. Y., 346) substantially disposes of this appeal. There the words considered were "legal heirs," and the court was required to determine whether by that class the testator intended to designate the individuals merely who should take, or to fix also the quantity of interest which should devolve upon each; and the determination was that the plaintiffs took no interest in the personal estate, inasmuch as under the statute of distributions representation extends no further than brothers and sisters' children; and the rule of intes-

tacy applying as to the quantity of interest to be taken, it resulted that the statute deprived the plaintiff, who was a grandchild of a brother, of all interest in the personal estate.

The interpretation placed upon the clause in question by the learned justice in the court below seems to be unassailable, if we give expression to the plain import of the language used by the testator. He directed that his whole estate should be divided, in accordance with the laws of the State applicable to persons who die intestate, among his heirs-at-law. The language which seems at once to suggest this view is the words "heirs-at-law." Who, it may be asked, would be embraced, however, within that term if he had died intestate? The answer to this query is that it would include those named by the statute of distributions existing in this State which designates the persons who should receive his personal estate and in what proportions, and also those, if any, to whom his real estate would descend. And giving to the persons forming each of these classes whatever of the estate would go to them under the laws of the State, would seem to be such a division of his property as he contemplated when he made his will. As already suggested, there is nothing to indicate any other purpose. It is precisely as if the testator had said, I do not intend that there shall be any dispute over my estate. I mean to declare that the persons who are recognized by the law of the State of New York as entitled to a portion of it shall have it to the extent the law declares. My real estate shall be divided amongst those to whom it would descend, and my personal estate shall be distributed to those who would be entitled to it just as if no will had been made. And I make this will only for the purpose of securing the co-operation of the executors whom I have named to take charge of my estate and protect it.

For these reasons the judgment appealed from should be affirmed.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Judgment affirmed.

LOUISE DUDLEY CARTER, APPELLANT, v. WILLIAM J. FERGUSON, RESPONDENT.

Actor agreeing to render exclusive service to one — when restrained by injunction from acting for another.

A preliminary injunction to restrain an actor from breaking a contract, by which he has agreed to perform services exclusively for the plaintiff, will not be granted, except in cases where the artistic abilities of the defendant are exceptional, so that his place cannot readily be supplied.

It is only under such circumstances that irreparable damages can result to the plaintiff from a breach of the contract.

APPEAL by the plaintiff Louise Dudley Carter from an order of the Supreme Court, entered in the above-entitled action on the 20th day of October, 1890, in the office of the clerk of the county of New York, denying the plaintiff's motion for an injunction enjoining and restraining the defendant from performing or rendering services for any persons other than the plaintiff until a certain contract, made by the defendant with the plaintiff, should have been performed.

Abe H. Hummel, for the appellant.

A. J. Dittenhoefer, for the respondent.

BARTLETT, J. :

In order to warrant the granting of a preliminary injunction to restrain the violation of a contract, it should be made to appear that the plaintiff has no adequate remedy at law. The inadequacy of the legal remedy is the test as to whether the defendant should or should not be restrained in the class of cases to which the present suit belongs. The English courts and our own have frequently granted injunctions, *pendente lite*, to prevent actors from performing for other parties when they have undertaken to play only for the plaintiff; but the exercise of this jurisdiction has usually been confined, and ought, in our judgment, always to be limited, to cases where the artistic abilities of the defendant are exceptional, so that his place cannot readily be supplied, for it would seem to be only under such circumstances that irreparable damage can be occasioned to the plaintiff. As is well said by Mr. Pomeroy: "Where a contract stipulates for special, unique or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having

special, unique and extraordinary qualifications, as, for example, by an eminent actor, singer, artist and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person." (3 Pomeroy's Eq. Jur., § 1343.) The General Term of the third department, commenting upon this passage, points out that the jurisdiction to interfere by injunction approved therein is confined to cases of special, unique and extraordinary qualifications on the part of the defendant, and LEARNED, P. J., remarks: "It can readily be seen that the court might restrain by injunction a great actor from playing at another theater in violation of his contract, while it would not restrain a salesman from quitting his employ before his contract had expired, even though, under the contract, he were to be paid a percentage on sales." (*Bronk v. Riley*, 50 Hun, 489.)

Now, it is in no wise derogatory to the defendant in this case to say that he is not shown to be an actor of special, unique or extraordinary qualifications. His own counsel on this appeal expressly asserts that the defendant is not a star or attraction of the company, or even a prominent member thereof.

However capable an actor the defendant may be, he has not yet achieved distinction. He does not seem to have been engaged to perform what is known as the part of the leading man in the plaintiff's company, his name appearing only third in the published list of the performers who were to act with Mrs. Carter. The affidavits do not satisfy us that his failure to keep his contract with her, or his appearance, in violation of that contract, at another theater has done or will do her any irreparable injury, or any damage incapable of being ascertained in an action at law.

For these reasons, without considering the others urged by counsel, or referred to by the court below, we think the application for an injunction was properly denied.

The order appealed from must be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., and BARRETT, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

Cases

DETERMINED IN THE

FIFTH DEPARTMENT

AT

GENERAL TERM,

January, 1891.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. CHARLES H. SCHAD, APPELLANT.

Appeal from an order denying a motion for a new trial, unnecessary in a criminal action — misconduct on the part of the jury requiring that a new trial be granted.

In a criminal action it is not necessary to state in the notice of appeal that it is taken from the order denying the defendant's motion for a new trial, as sections 485 and 517 of the Code of Criminal Procedure provide that, upon an appeal from a judgment, the decision of the court on a motion for a new trial may be reviewed.

After the jury had retired to deliberate on their verdict in a criminal case the officer having them in charge, without leave of the court, took them to dinner at a hotel, and before dinner one of the jurors separated himself from his fellows and entered the public bar-room where he called for and drank brandy at the bar; and on the same occasion another juror, after dinner, went alone to the water-closet in the basement of the hotel, and followed, but did not overtake, until they arrived at the court-house, the other jurors, who had preceded him on their return.

Afterwards, when, by leave of the court, the jury, not having agreed upon the verdict, were taken to the hotel for supper, the juror who had taken brandy before dinner went alone to the bar-room and drank there again.

Held, that this constituted misconduct on the part of the jury which vitiated the verdict, and because of which a new trial should be granted.

APPEAL by the defendant from a judgment, entered, in the above-entitled action, in the office of the clerk of the county of Niagara on the 20th day of April, 1889, and from an order denying a motion

for a new trial, after a trial before the county judge of Niagara county, and justices of sessions of said county and a jury, at the Court of General Sessions of that county, on the 25th day of March, 1889.

The defendant was convicted of forgery, and was sentenced to be confined in the State prison at Auburn for the term of five years and eight months at hard labor.

John T. Murray, for the appellant.

P. F. King, district attorney, for the respondent.

DWIGHT, P. J. :

The specification in the notice of appeal, of the order denying the defendant's motion for a new trial, was unnecessary, since the statute provides that upon an appeal from the judgment the decision of the court on the motion for a new trial may be reviewed. (Code of Criminal Pro., §§ 485, 517.) The conviction was of a felony and the judgment pronounced was of imprisonment in the State prison for the term of five years and eight months.

The motion for a new trial was on the ground of misbehavior of the jury. The facts, in this respect conceded to be true, are that after the jury had retired to deliberate on their verdict the officer having them in charge — without leave of the court — took them to dinner at a hotel a quarter of a mile distant from the court-house; that before dinner one of the jurors separated himself from his fellows and entered the public bar-room of the hotel where he called for and drank brandy at the bar; that on the same occasion another juror, after dinner, went alone to the water-closet in the basement of the hotel, and the jury having, in the meantime, set out to return to the court-house he followed, but did not overtake them until they arrived at the court-house; that when, by leave of the court, the jury, not having yet agreed upon a verdict, were taken to the hotel for supper, the same jurymen who had taken brandy before his dinner repeated the indulgence before eating his supper, going alone as before to the bar-room for that purpose.

We have no hesitation in saying that this narrative discloses misconduct on the part of the jury which vitiated the verdict and for which a new trial should have been granted. The conduct of

the officer in taking the jury to dinner without leave of the court, and permitting two of the jurors to separate from their fellows, was in violation of his oath "to keep the jury together in some private and convenient place without meat or drink, water excepted;" and, by express provision of the statute, it was in the power of the court in which the trial was had to set aside the verdict for the sole cause of the separation of the jury. (Code of Criminal Procedure, § 465, sub. 3.) The provision cited specifies, among other cases in which the trial court may grant a new trial, the case "when the jury have separated without leave of the court after retiring to deliberate upon their verdict." The concluding clause of the subdivision, viz., "*or* have been guilty of any misconduct by which a fair and due consideration of the case has been prevented," is disjunctive in effect as it is in form, and relates to acts of misconduct other than that particularly specified. In this case, in the absence of evidence that either of the jurors, while separated from his fellows, conversed with any person on the subject of the trial, we should, no doubt, support the trial court in the exercise of its discretion not to grant a new trial for the sole cause of the separation of the jury. But the conceded fact that, during the time devoted to the deliberations of the jury, one of their number twice indulged in the use of intoxicating liquor, we regard as fatal to the verdict. The last clause of subdivision 3 of section 465, above quoted, must be regarded as including all acts of misconduct on the part of the jury or of a juror, which either are shown or may be presumed to have interfered with the due and proper consideration of the case submitted to them. It is apparent that there are few cases in which actual prejudice can be affirmatively shown to have resulted from any misconduct of a juror. Even though it were shown that a juror has been subjected, outside the jury-room, to direct personal efforts to influence his action, it would be easy for him to affirm, and impossible to deny, that his mind was already made up, and that his action was wholly unaffected by the attempt to influence it. But no one will contend that in such a case the verdict should stand, or that it would be in the discretion of the trial court to refuse to set it aside. So in respect to the use of intoxicating liquor, it is impossible for the court to measure or estimate the effect of an alcoholic stimulant, which varies with the susceptibility of the person by whom it is taken; it is

enough that its well-known tendency is to produce an abnormal elevation, and, in the reaction, a corresponding depression of mind and a consequent disturbance, in a greater or less degree, of the reasoning powers. It is for this reason that the use of intoxicating liquor by jurors while deliberating on their verdict is not permitted except as a necessary medicine, and its unauthorized use at such time by one or more jurors has usually been regarded in this country as furnishing ground for setting aside a verdict in a case of felony.

In the early and leading case of *Commonwealth v. McCaul* (Virginia Cases, 271), the report of which is reproduced in a note to the case of *Smith v. Thompson* (1 Cowen, 221, note on 235-237), Mr. William Wirt challenged the prosecution to cite a case in which a verdict of felony, procured under such circumstances, had been allowed to stand. It was with reference to that case that Mr. John C. Spencer, for the prisoner, in the case of the *People v. Douglass* (4 Cowen, 26), said: "The great principle decided by this case is that the door to abuse is not to be opened." In the case of the *People v. Lee Chuck* (reported in 39 Alb. Law Jour., 354), the Supreme Court of California reviewed the cases on this subject in all the States, and reached the conclusion "that where the proof of the drinking is clear and undisputed, and that it was done while the jury was actually deliberating upon their verdict in a capital case, a verdict of conviction should not be allowed to stand." There can be no valid distinction in this respect between the case of a capital and that of any other felony. It is instructive to note that the decision in California was made under a provision of the Penal Code of that State, which is a transcript of subdivision 3 of section 465 (*supra*) of our Criminal Code. The fact that in the California case the use of wine with their dinner was indulged in by all, or most of the jurors, is unimportant; the defendant on trial has the right to the exercise of the cool, clear and undisturbed judgment of every member of the jury, and whether it be the intellect of one or more of the twelve which has been clouded or unbalanced by the use of alcoholic stimulants, the effect, in either case, must be equally fatal to the verdict rendered,

We think the Court of Sessions in this case failed to attach due importance to the facts bearing upon the question here discussed, and erred in not granting defendant's motion for a new trial.

FIFTH DEPARTMENT, JANUARY TERM, 1891.

The judgment appealed from should be reversed and a new trial granted.

MACOMBER and CORLETT, JJ., concurred,

Judgment reversed and case remitted to the Court of Sessions of Niagara county to proceed therein.

FRED P. WILCOX, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF OTIS N. WILCOX, DECEASED, RESPONDENT, v. QUINCY VAN VOORHIS AND FRANCES A. VAN VOORHIS, APPELLANTS, AND OTHERS.

Interest on a bond and mortgage — at what rate chargeable — voluntary payment.

In an action brought for the foreclosure of a mortgage, which provided that it was "intended as security for the payment of the sum of twelve hundred dollars in one year after the date hereof, with interest thereon at the rate of seven per cent per annum, to be paid half-yearly on the first days of January and July in each year, and also at the time the principal shall be paid," it appeared that, up to January, 1889, interest had been paid thereon at the rate of seven per cent per annum.

Held, that such payments of interest, in excess of the amount legally collectible, having been voluntarily made with a full knowledge of the facts, that the owner of the mortgaged premises was not entitled to have the excess thereof, over and above legal interest, applied on the principal of the debt.

That, by the terms of the bond and mortgage in this case, the plaintiff was entitled to collect interest, at the rate of seven per cent per annum, down to the time of actual payment, or until the contract was merged in a judgment.

APPEAL by the defendants, Quincy Van Voorhis and Frances A. Van Voorhis, from a judgment of the County Court of Monroe county, entered in the office of the clerk of the county of Monroe on the 12th day of June, 1890.

Eugene Van Voorhis and Wile & Goff, for the appellants.

E. F. Wellington, for the respondent.

DWIGHT, P. J.:

The action was to foreclose a mortgage of real estate. The only question litigated was of the sufficiency of a tender made before the commencement of the action, and that turned wholly upon the

question whether interest had been paid in excess of the rate legally chargeable, and whether the defendants were entitled to have such excess applied in reduction of the principal sum due on the mortgage.

The facts were as follows: The mortgage was for \$1,200, and was made in 1873 by the defendant Frances A. Van Voorhis to the Monroe County Savings Bank, and assigned by the latter in 1879 to the plaintiffs' testator. The mortgage was, by its terms, "intended as security for the payment of the sum of \$1,200 in one year after the date hereof, with interest thereon at the rate of seven per cent per annum, to be paid half yearly on the first days of January and July in each year, and also at the time the principal shall be paid * * * according to the conditions of a bond," etc., and the conditions of the bond were to the same effect. In July, 1881, the mortgagor conveyed the mortgaged premises to the defendant Quincy Van Voorhis, who thereupon, as part of the purchase-price, assumed and agreed to pay the mortgage. Up to the date of such conveyance the mortgagor had paid the interest at the rate of seven per cent per annum. After the conveyance the defendant Quincy Van Voorhis continued to pay the interest at the same rate, namely, the sum of forty-two dollars semi-annually, up to and including the first payment in the year 1889, taking receipts therefor, which, in most instances, specified that the same was received as interest. On the 1st of July, 1889, he tendered to the plaintiff the sum of \$1,181.50 as in full of the amount due on the mortgage. The plaintiff declined to receive the tender as not being sufficient in amount, and subsequently commenced this action.

The tender was sufficient in amount only upon the theory that there had been an over-payment of interest by the difference between six and seven per cent from the 1st day of July, 1881, and that the defendant was entitled to have the excess applied as payment on the principal of the mortgage. The learned county judge held and found that the payments of interest in question were in excess of the amount legally collectible, but that such payments were voluntarily made by the defendant with full knowledge of the facts, and that for that reason he was not entitled to have the excess applied on the principal debt secured. We think that, upon the authorities cited by him, the county judge was clearly right in his final conclusion as to the effect of a voluntary payment, even though in

excess of the rate of interest collectible under the terms of the security. (*New York Life Ins. and Trust Co. v. Manning*, 3 Sandf. Ch., 63; *Ritter v. Phillips*, 53 N. Y., 588; *Bennett v. Bates*, 94 id., 355.) But we are also of the opinion that, by the terms of the bond and mortgage in this case, the plaintiff was entitled to collect interest at the rate of seven per cent down to the time of actual payment, or until the contract was merged in a judgment. Seven per cent was the legal rate of interest at the time the contract was made. It is true the mortgage was payable in one year from its date, but we think the condition, taken as a whole, clearly implies that interest was to be paid at the same rate until the principal should be paid. The language of the condition is: "This grant is intended as security for the payment of the sum of \$1,200 in one year after the date hereof, with interest thereon at the rate of seven per cent per annum, to be paid half yearly on the first days of January and July *in each year*, and also *at the time the principal shall be paid*." It is well known to be the custom of savings banks to require mortgages taken by them to be made payable in one year, but to suffer them to run for a series of years so long as the interest is promptly paid. Seven per cent was the legal rate of interest at the time the mortgage was made, and it was entirely unnecessary to specify that rate of interest in respect to the time for which, by its terms, the mortgage was to run. Such specification could have no effect, except in contemplation of an indefinite extension of the time of payment of the mortgage and of a possible change in the legal rate of interest during such extension; and the particular terms employed in this condition, we think, point to the same contingencies as within the contemplation and intention of the parties at the time this contract was made.

If it be the proper interpretation of this contract that the parties understood and intended that interest should be paid at the rate specified until the principal should be paid, then no subsequent change of the statute could affect the rate of interest payable on this mortgage down to that time, or until the contract is merged in a judgment. (*O'Brien v. Young*, 95 N. Y., 428, 430; *Taylor v. Wing*, 84 id., 477.)

Upon this ground, as well as upon that indicated in the opinion of the county judge, we agree with him that the defendant was not

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entitled to any credit on the principal debt of the mortgage by reason of excess of interest paid, and, consequently, that the tender made by him was insufficient in amount to affect the lien of the mortgage.

The judgment appealed from should be affirmed.

MACOMBER and CORLETT, JJ., concurred.

Judgment appealed from affirmed, with costs.

HENRY SLINGERLAND, RESPONDENT, v. WILLIAM H.
NORTON, APPELLANT.

Evidence — proposals for a settlement — admission of a fact — offer to settle — proof of a settlement made with another person.

Negotiations or proposals looking towards the settlement of a controversy without action, cannot be received in evidence as admissions of liability. This rule, however, does not extend to an admission of a disputed fact, even though made in the course of such negotiations.

An offer or consent or expression of willingness to settle cannot be considered as an admission of liability; nor is evidence of the fact of the settlement, without litigation, of the claim of another party arising out of the same transaction, competent against the party effecting the settlement.

APPEAL by the defendant, William H. Norton, from a judgment of the Ontario County Court, entered in the office of the clerk of the county of Ontario on the 13th day of January, 1890, in favor of the plaintiff for \$236 damages and costs, and affirming the judgment of a justice of the peace rendered on June 5, 1888.

C. J. Bissell, for the appellant.

W. W. Clark, for the respondent.

DWIGHT, P. J.:

The action was for the alleged negligent burning of the plaintiff's timber by fire allowed to escape from the defendant's fallow. The defendant controverted the allegation of negligence in the setting and management of the fire on his own land, and sought to avoid liability on the ground that the negligence, if any, was not that of himself, his agents or servants, but of a third person who had taken

the contract to clear his land, fit for the harrow, at an agreed price per acre, and that the means and time of accomplishing that result were not in the defendant's control. The justice who tried the case, without a jury, gives the reasons for his judgment in his return, from which it appears that he decided the question of fact last above suggested against the defendant's contention, and found that the person who did the work and set the fire was not an independent contractor, but the servant of the defendant, and that the latter was responsible for his negligence. The evidence bearing upon this question was conflicting, and, unfortunately, it embraced two items of testimony in behalf of the plaintiff objected to by the defendant which were improperly admitted. The first was in violation of the familiar rule that negotiations or propositions looking to the settlement of a controversy without action cannot be given in evidence as admissions of liability. (1 Greenleaf on Evidence, § 192; Stephens Dig. of the Law of Evidence [Chase's ed.] 52, note, and the cases cited.)

The rule is well founded in reason. The law is willing to encourage the compromise and settlement of controversies without litigation, and holds communications looking to that end as privileged in their character, and not to be used to the prejudice of the party making them. It is true the privilege does not extend to an admission of a disputed fact, even though made in the course of such negotiations; but this does not detract from the force of the rule. The principle is that an offer or consent, or expression of willingness to settle, is not to be taken as an admission of liability, and is, therefore, not evidence of the fact. The testimony objected to was within the rule. There was in it no admission of any fact in controversy, but only the expression of a desire that the matter might be settled without paying money to the lawyers.

The same rule should, *a fortiori*, have excluded the testimony objected to, of the fact of a settlement, without litigation, of the claim of another neighbor for damage done by the same fire. What motives or considerations may have influenced the defendant to make that settlement does not appear. The fact that he did settle with a third person was not to be taken as an admission of his liability, for the same reason that his proposition to settle with the plaintiff was not to have that effect.

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The reasons for his judgment given by the justice in his return are pertinent and forcible, and we should probably have no hesitation to affirm that judgment had the conclusion of fact upon which it was based been reached upon evidence all of which was relevant and admissible on the issue involved.

For the error indicated the judgment of the County Court and of the justice must be reversed.

MACOMBER and CORLETT, JJ., concurred.

Judgment of County Court and of the justice of the peace reversed, with costs.

**AUGUSTUS FRANK AND EBEN O. McNAIR, APPELLANTS
AND RESPONDENTS, v. CHARLES L. BINGHAM, RESPOND-
ENT AND APPELLANT.**

Proceeds of a note sent to a bank for collection — when recoverable from the receiver of the bank.

In an action brought to recover from the receiver of a bank the avails of a note which had been sent to it for collection, and had been collected by the bank, which failed immediately after such collection, it is necessary that the plaintiff should show that the avails of the note came into the hands of the receiver.

In case the proceeds of the note have been used by the bank prior to the appointment of the receiver, and are not represented in the assets in the hands of the receiver, the plaintiff is not entitled to a preference in the payment of his claim over other creditors of the bank.

APPEAL by the plaintiffs from a judgment, entered in the office of the clerk of the county of Livingston on the 3d day of July, 1890, in favor of the plaintiffs and against the defendant, for the sum of \$270.04, including costs, so far as the justice before whom the action was tried, and who directed the entry of such judgment, refused to direct judgment for the further sum of \$530.42 and interest, and by the defendant Charles L. Bingham, from so much of the said judgment as orders and adjudges "that the plaintiffs recover judgment against the defendant for the amount of \$140.40, with interest thereon from the 18th day of August, 1887."

J. A. Vanderlip, for the plaintiffs.

M. H. Briggs, for the defendant.

DWIGHT, P. J. :

The action was to recover the avails of certain commercial paper forwarded by the plaintiffs to the First National Bank of Dansville for collection, and collected by the bank shortly before its failure in 1887. The defendant is the receiver of the bank, though sued in his individual name, and the complaint demands judgment against him, to "be paid by the defendant out of any moneys in his hands as such receiver, before making any distribution of the money or property of the said First National Bank of Dansville, to the general creditors of the said bank and in preference thereto."

The plaintiffs were private bankers at Warsaw, in the county of Wyoming; the First National Bank of Dansville was, as its name imports, a banking corporation organized under the laws of the United States, doing business at the village of Dansville, in Livingston county. The plaintiffs were accustomed to send commercial paper held or received for collection by them and payable at Dansville, to the bank mentioned, for collection; and it was the custom of the bank to remit the avails of such collections, less commissions, by drafts drawn by it on its correspondent in the city of New York. On the 16th day of August, 1887, the plaintiffs mailed to the bank at Dansville, for collection and remittance, four checks drawn on that bank by depositors therein, aggregating \$435.84, and a note of one Beyer for \$140.40, payable at the same bank on the eighteenth day of the same month. The paper was received at the bank on the seventeenth, the checks were charged to the several accounts of the drawers, which were good for the amounts, and on the same day the bank remitted to the plaintiffs its draft on New York for the aggregate amount of the checks, less fees for the collection. The note of Beyer was paid in cash on the eighteenth. The money was not kept separate from, but was mingled with other cash on hand, of which about \$2,000 was received, and much more than the amount of the note was paid out the same day. On the same day the bank sent to the plaintiffs its draft as usual, for the amount of the note, less fees for collection. On the twentieth of the same month the plaintiff sent to the bank at Dansville two

more checks drawn upon it by its customers, aggregating ninety-four dollars and eighteen cents. These were received on the twenty-second, and, as before, charged to the several accounts of the drawers, which were good for the amounts. On the twenty-third the bank closed its doors on account of insolvency, having received and paid out money in the usual course of its business down to and including that day. Neither of the drafts remitted to the plaintiffs was paid. Soon afterwards the defendant was duly appointed receiver of the bank under the laws of the United States. He immediately qualified as such and took possession of the assets of the bank. He found among those assets the sum of \$189.19 in cash, which he turned over as required by law, to the comptroller of the currency of the United States. Since that time, and including that amount, he has collected from the assets of the bank about \$11,000. Some time after his appointment as receiver, but how long after does not appear, except that it was before the commencement of this action, the plaintiffs demanded of him the avails of the six checks and the note above described, and payment being refused they brought this action.

The theory of the action is, distinctly, that of a trust impressed upon the avails of the several collections in the hands of the bank, and accompanying those avails into the hands of the receiver. The court, at Special Term, sustained that theory in respect to the avails of the note of Beyer, but found it not applicable to the case of the checks, and gave judgment against the defendant for the amount of the note, with interest, and for costs. We think the theory fails of application to any portion of the plaintiff's demand, for the reason that it is not shown that any portion of the funds in question came into the hands of the receiver.

No principle seems to be better established than that, "in order to follow trust funds and subject them to the operation of the trust, they must be identified." The rule is stated in those terms by ANDREWS, J., in *Cavin v. Gleason* (105 N. Y., 256). Of course, it is not intended that, in the case of money, the particular coin or bank notes must be found to be, or shown to have been, in the hands of the person sought to be charged with the trust. On the contrary, the opinion from which we quote recognizes and formulates the rule in equity "that, as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for a valuable

consideration, without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust ;” and further on the same learned judge says : “A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law ; and it may be sufficient, to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place.”

In this case, as we have seen, the court found in favor of the plaintiffs for the amount of the Beyer note, but there was no finding that the avails of the note ever came into the hands of the receiver, nor that they were not wholly paid out on other demands against the bank before it closed its doors. Such a finding could not have been sustained upon the evidence in the case ; the almost necessary inference therefrom being to the contrary. The bank did business on what must have been a very narrow margin of cash for five days after the \$140 was received in payment of the note, and at the end of that time had only \$189 of cash on hand. In the nature of things it was impossible to identify any portion of the avails of the note with any portion of the scarcely larger amount of cash which came into the hands of the receiver ; the latter was as likely to be the avails of any other collection made at about the same time, as of the Beyer note. And in this connection it is interesting to learn from the report of the case of *Arnot v. Bingham* (29 N. Y. St. Rep., 878), that the same small residue of cash which came into the hands of the receiver, had, when this action was tried, already been adjudged to be the property of the plaintiffs in that action, upon facts almost precisely similar to those presented by the record before us. That judgment was rendered at Special Term in the sixth district, and was affirmed, with hesitation, by the General Term in the fourth department. The case, though fully sustaining the legal contention of counsel for the plaintiffs, was naturally, perhaps, not cited by him in his

argument here, but our attention was called to it by counsel for the defendant as curiously illustrating the necessity of an actual identification of some portion of the fund which passed to the receiver with the particular trust fund sought to be recovered in the action. Should both of these Special Term judgments be finally affirmed, we should have the same small balance of cash which came into the hands of the receiver judicially determined to belong to two different parties, by reason of its being held to be the same money received in trust for both; and if one should be finally affirmed, and not the other, we are at a loss to see upon what principle the preference would be given. The General Term in the fourth department, in an opinion by MARTIN, J., admits "that the question whether the fund recovered in this (that) action was, in fact, the property of the plaintiffs, or so far impressed with a trust in their favor as to constitute them equitable owners thereof, is not free from doubt;" but that court was inclined to the opinion that the doctrine of the case of the *People v. The City Bank of Rochester* (96 N. Y., 32), justified the holding of the trial court.

The case thus referred to is also the authority chiefly relied upon by counsel for the plaintiffs in this action. We are unable to give to it the same effect as our brethren in the fourth department, especially in view of the explanation and qualification given to it by the court in the later case of *Cavin v. Gleason* (*supra*). In the latter case the court say: "The case of the *People v. The City Bank of Rochester* (96 N. Y., 32) seems to have been misunderstood. The question in this case was not raised there, and it was not claimed in that case that the proceeds of the checks of Sartwell, Hough & Co., the petitioners, had not gone into the general funds of the bank, or that they had not passed in some form to the receiver. The court did not decide, nor intend to decide, that the petitioners would have been entitled to a preference in case the proceeds of the check had been used by the bank and were not represented in its assets in the hands of the receiver."

Thus explained and qualified, the case of the City Bank of Rochester is saved from conflict with the doctrine so clearly expounded in our previous quotations from the opinion in *Cavin v. Gleason*.

We think that doctrine is fatal to the plaintiffs' contention in this case, and, accordingly, that the judgment of the Special Term, so

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far as it awards a recovery to the plaintiffs, should be reversed and judgment absolute ordered for the defendant.

MACOMBER and CORLETT, JJ., concurred.

That portion of the judgment appealed from by the defendant reversed; in other respects judgment affirmed and the complaint dismissed, with costs of this appeal and of the Special Term to the defendant.

THOMAS L. HULBURT, APPELLANT, v. FLETCHER A.
DEFENDORF, AS SUPERVISOR, ETC., RESPONDENT

WILLIAM P. CHASE, APPELLANT, v. SAME, RESPONDENT.

Supervisor — right to compromise an action although the judgment therein is chargeable to the town — right of the town to order an appeal to be taken.

An action having been brought against the supervisor of a town to recover for professional services rendered by the plaintiff, as an attorney and counselor-at-law, to the predecessor of such supervisor, judgment was entered in favor of the plaintiff for \$804.80, and was appealed from by the supervisor, after which negotiations were carried on between the plaintiff and the supervisor, resulting in a stipulation, whereby it was agreed by the plaintiff that upon the payment of \$400 and the costs, as entered in the judgment, with interest, and upon consideration that no appeal should be taken from such judgment by the defendant, the judgment should be satisfied and the action be discontinued, provided such payment should be made before the 15th day of February, 1891. The supervisor thereupon withdrew the notice of appeal from the judgment, which had been theretofore served, and leave was obtained from the Special Term to withdraw such notice of appeal, and on application to the General Term such appeal was dismissed, prior to which, however, a town meeting had been held, at which a resolution was passed directing the supervisor to appeal from the judgment.

Held, that, as there was no evidence that the compromise was not honestly made, the supervisor was not bound by the action of the town board, although, by the provision of the statute, the amount of the judgment was payable by the town after its audit by the town board.

That, in the absence of fraud, the supervisor had the power to settle the matter in dispute.

That although in certain actions, which may be maintained by parties against the town in its municipal name, it is made, by statute, the duty of the super-

visor of the town to place before the electors of the town a full statement of such suit or proceeding for their direction in regard to the defense thereof, the statute has no application, nor is the supervisor bound to accept the instructions of the town board, in an action brought against him in his individual name.

APPEAL by the plaintiff Thomas L. Hulburt from an order of the Supreme Court, granted at Special Term on the 31st day of March, 1890, and entered in the office of the clerk of the county of Monroe on the 22d day of April, 1890; and by William P. Chase from an order of the Supreme Court, granted at Special Term on the 22d day of April, 1890, and entered in the office of the clerk of the county of Monroe on the same day.

The order appealed from by Thomas L. Hulburt provided as follows:

Ordered, That Fletcher A. Defendorf, newly-elected supervisor of the town of Perinton, county of Monroe and State of New York, be, and he hereby is substituted in the place and stead of Thompson G. Jones as the defendant in this action; and it is further

Ordered, That the order entered in this action on the 5th day of March, 1890, dismissing and setting aside a notice of appeal duly filed herein with the clerk of Monroe county on the 29th day of January, 1890, be, and the same hereby is vacated and set aside, and the defendant may perfect his appeal from the judgment recovered by the plaintiff in this action, the notice of appeal already served upon the plaintiff on or about the 29th day of January, 1890, to be and continue the notice of appeal herein, the same being a copy of the notice of appeal filed in the clerk's office on the said 29th day of January, 1890; and it is further

Ordered, That the defendant may file and serve exceptions to the report of the referee within ten days from the entry of this order, *nunc pro tunc*, and may make and serve a case upon appeal with exceptions to the General Term, fifth department, from said judgment, and that he may have thirty days from the entry of this order in which to make and serve such case and exceptions, with ten dollars costs of this motion to be paid by the defendant to the plaintiff herein.

Walter S. Hubbell, for the appellant.

James L. Angle and *W. Martin Jones*, for the respondent.

MACOMBER, J.:

This action was begun in the month of May, 1889, against one Thompson G. Jones, supervisor of the town of Perinton, in the county of Monroe, to recover for professional services as an attorney and counselor-at-law, rendered to the predecessor of Jones, supervisor of such town, in an action in which such supervisor defended in behalf of the town. An answer was interposed and the case was referred to a referee to hear and determine the same. The amount claimed in the complaint by the plaintiff was the sum of \$550, but at the trial, upon application, the complaint was amended in the amount of the claim, made so as to conform to the proof, and, in pursuance thereof, the referee reported a recovery, in the sum of \$804.30, for the plaintiff.

Shortly after the entry of the judgment, in pursuance of such report, negotiations were begun by the then defendant with the plaintiff for a compromise of such judgment, in pursuance of what was then believed to be the public sentiment of a majority of the taxpayers of the town that it would be well to pay one-half of the recovery, besides costs, rather than further to litigate the matter. Accordingly a stipulation was entered into between the plaintiff and the supervisor of the town, by which, upon the payment of such sum of \$400 and the costs, as entered in the judgment, with interest thereon from the time of the entry of the judgment, and upon a further consideration that no appeal should be prosecuted from such judgment by which the plaintiff should be put to further costs and expenses in collecting his claim, and the said sum of \$400, besides costs, paid on or before the 15th day of February, 1891, then the judgment, as entered, should be satisfied and the action discontinued. Thereupon the defendant withdrew his notice of appeal to the General Term from the judgment which had theretofore been entered and served.

Accordingly, upon an application to the Special Term by both parties, leave was granted to the defendant to withdraw the notice of appeal, and in pursuance of the same agreement an application was made to the General Term on the 25th day of March, 1890, for the dismissal of such appeal, which was accordingly granted. Prior to this time a town meeting had been held at which a resolution was passed directing the supervisor to appeal from such judgment.

There is not in the papers before us any evidence that the compromise of the judgment was not honestly made and the agreement entered into for the best interest of all parties to the litigation. It is true that the moving papers allege, in a general way, that the compromise and the dismissal of the appeal were in pursuance of a conspiracy, yet no fact is stated on which such a conclusion can reasonably be based. The high character of the referee, upon whose report the judgment was entered, adds strength to the presumption of law that the judgment was correct. So, also, the characters of the attorneys of record preclude any assumption that the agreement by which this litigation was ended was not in all respects just and fair. It follows, therefore, that the order of the Special Term by which the notice of appeal was withdrawn, followed by the order of the General Term dismissing such appeal, both done in pursuance of the terms of the written agreement, must be deemed to be valid and unassailable by motion unless the same was made contrary to some statutory regulation.

The learned judge, at the Special Term, in his opinion, has held that the special town meeting directing that an appeal be taken was binding upon the defendant, and inasmuch as the plaintiff knew of such meeting and of the passage of such resolution, he is bound by it as well as the defendant. It is true that any judgment which was recovered against Jones, as supervisor of the town of Perinton, was, under the Revised Statutes (2 R. S., 474, §§ 102, 103), payable by the town, after the same had been audited by the town board, or that failing after it had been reported to the board of supervisors under whose direction a provision might be made for levying the same by tax upon the town. But it by no means follows, from these provisions of the statute, that the defendant had not full control over the management of the case within the ordinary rules governing the rights of parties to actions. If, in making the settlement, the defendant was guilty of any corrupt misconduct in office, by which the rights of the town were impaired, an action would lie in behalf of the town against him. Furthermore, had any fact been disclosed upon the motion as contained in the appeal papers, showing that such settlement was in fraud of the rights of the town or accomplished by means of deception practiced upon the supervisor or upon the court, an entirely different question would arise. In

the absence of such evidence we see no reason why the defendant should not have the power to settle the case in the manner above disclosed. The only objection that can be made to it is contained in 1 Revised Statutes (357, § 3), which is as follows: "In all legal proceedings against towns by name, the first process, and all other proceedings required to be served, shall be served on the supervisor of the town; and whenever any such suit or proceeding shall be commenced, it shall be the duty of the supervisor to attend to the defense thereof, and to lay before the electors of the town, at the first town meeting, a full statement of such suit or proceeding for their direction in regard to the defense thereof."

It will be seen, however, that the duty to lay before the electors of the town, at the town meeting, a statement of the suit or proceeding, so as to receive the direction of the town in regard to the defense thereof, is limited by the words of the statute to legal proceedings taken against the town by name. There is a class of actions, not necessary to refer to in detail, which may be maintained by the parties against the town in its municipal name. The processes in such cases are required to be served upon the supervisor, and he in turn is required to report the same to the town meeting. But there is no statutory requirement for him to lay before the town meeting, or to accept their instructions in actions against him in his individual name, and consequently an honest settlement of any litigation made by him ought to be deemed to be conclusive in behalf of the other side to the controversy. It was suggested in the opinion below that if the contention made in behalf of the plaintiff, that an actual majority of the electors of the town of Perinton were in favor of this compromise and settlement of the action and dismissal of the appeal was true, such fact might be ascertained at the next town meeting. But it seems to us that the decision of the courts ought not to be required to hang upon the votes of the electors of the town in such a matter as this. Six hundred taxpayers, being a majority, or at least half of the whole electors, had signed a petition for the settlement of the suit in pursuance of the action of the supervisor. A mere handful of electors assembled at the town meeting, under political manipulation, have passed a resolution asking that the order permitting such settlement be set aside, and the appeal from the judgment be prosecuted. Yet, as pointed out above, the decision

of two courts had been taken upon agreement of the parties to the action, honestly made without any pretense of deceit or overreaching by either side. Should we sustain this order, we might again, after the next March town meeting, with a different result of the annual voting of the town, be called upon to revise our present action and restore the order originally made.

The case of William P. Chase against the same defendant, which was argued with this case and upon the same facts, must, under the stipulation, abide the result of our determination in this action.

It follows, therefore, that the order appealed from should, in each case, be reversed, with ten dollars costs and disbursements; also, that the original motion made and heard at the time of the hearing of this appeal to vacate our order of March 25, 1890, must be denied, with ten dollars costs.

DWIGHT, P. J., and CORLETT, J., concurred.

Order appealed from in each case reversed, with ten dollars costs and disbursements, and the motion denied.

SIRAGAN S. COSTIKYAN, AS ADMINISTRATOR OF THE ESTATE
OF STEPHEN K. BABASINIAN, DECEASED, RESPONDENT,
v. THE ROME, WATERTOWN AND OGDENSBURG
RAILROAD COMPANY, APPELLANT.

Railroad company — liability of, for the death of a passenger passing from one car to another while the cars were in motion.

An action was brought to recover against a railroad company the damages resulting from the death of a passenger who, a short time after he had entered a passenger coach, on a train on the defendant's road, went into the smoking car, and after smoking a cigarette started to return into the passenger coach. While he was in the act of stepping from the platform of the smoking car to the passenger coach, in the rear thereof, the coupling between those two cars broke and the deceased was thrown down a steep gorge, over which the train was passing at the time, and was killed.

The jury found that the breaking of the coupling was caused through the negligence of the defendant.

Held, that the passenger, in the absence of instructions or notice from the company not to do so, only assumed, in going from one car to another while the train was

in motion, the ordinary risks incident to such action on his part, and had a right to assume that the couplings and appliances were in a safe and proper condition, and that the railroad company was liable for the consequences of their not being so.

APPEAL by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Erie on the 2d day of May, 1890, in favor of the plaintiff; and also from an order, made May 1, 1890, denying the defendant's motion for a new trial made upon the minutes of the court.

The action was brought to trial at the Erie County Circuit, at which a verdict was rendered for the plaintiff for the sum of \$5,000.

Edmund B. Wynn, for the appellant.

Abram Bartholomew, for the respondent.

CORLETT, J.:

On the 28th day of June, 1888, the deceased took passage on the defendant's road from Niagara Falls to Watertown. The train consisted of an engine, baggage, smoking car and several passenger coaches. A short time after entering the coach he went into the smoking car with a cigarette. After smoking he started back into the passenger coach. While he was in the act of stepping from the platform of the smoker to the coach in the rear, the coupling between them broke and the deceased was thrown down a steep gorge over which the train was passing and killed. The plaintiff was appointed administrator. This action was brought; a trial was had in April, 1890, which resulted in a verdict of \$5,000 for the plaintiff. A motion for a new trial was made and denied, and the defendant appealed from the judgment and order to this court.

The evidence on the trial tended to show, and the jury found, that the breaking of the coupling was caused by the negligence of the defendant. The central contention of the defendant on this appeal is based on the assumption that it was negligence on the part of the deceased to go into the smoker and return while the train was in motion. It is undoubtedly true that ordinarily a passenger who goes from one car to another while the train is in motion assumes the risk incident to such an undertaking. If the ordinary motion of the train should shake him from the platform, there

being no defect in coupling or machinery, the company would not generally be liable. Not that the act of the passenger in passing from one car to another would be one of negligence, but because he would have just as good an opportunity as the defendant to know that there was some hazard attending a journey through the train while it was in motion. This fact being manifest, and as much within the knowledge and observation of the passenger as the company, in the nature of things he incurs the ordinary risk attending a passage from one car to another under such circumstances.

There is no statute or rule of the company forbidding a passenger from going from a passenger coach from which he is riding into the smoker and after that returning. In fact, a smoking car constitutes a part of the train for the accommodation of passengers; and in the absence of instructions or notices by the company to passengers not to go to it and return while the train is in motion, there is an implied license that they may do so subject, of course, to the ordinary risks obviously involved. It is not seen how they would incur any greater risks than the visible ones attending the journey. There is nothing tending to show that this accident would have happened except for the defective coupling. If the connection of the cars had been safe the deceased would have gone and returned, so far as appears, in perfect safety.

It is not negligence *per se* for a passenger to stand on the platform while the train is in motion. (*Nolan v. Brooklyn City and Newtown R. R. Co.*, 87 N. Y., 63; *Marquette v. C. and N. W. R. R. Co.*, 33 Iowa, 570; *Goodrich v. Penn. and N. Y. Canal Co.*, 29 Hun, 50.) The position of the deceased was in many respects the same as that of an employee.

In *Goodrich v. New York Central and Hudson River Railroad Company* (116 N. Y., 398) it was held that a railroad corporation owed its employees the duty of furnishing cars properly equipped with safe and suitable appliances. All the cases are to the same effect. The same is true in the case of a passenger. The company owes him the duty of providing safe machinery and appliances, and, if by its negligence in those respects a passenger is injured, no reason is seen why it is not liable for the damages sustained, in the absence of negligence on his part which contributed to the injury.

It was not shown on the trial that, in the present case, the deceased

in any way contributed to produce the accident which caused his death. The evidence tends to show the reverse. He only assumed the visible risks incident to going from one car to another while the train was in motion. In doing so he had a right to assume that the couplings and appliances were in a safe and proper condition. The injury was caused by the want of safe couplings. The case was properly submitted to the jury. (*Palmer v. D. and H. C. Co.*, 120 N. Y., 170.) No errors appear on the record which would authorize a reversal.

The judgment and order must be affirmed.

MACOMBER, J. :

I concur in the result reached in the opinion herein of Mr. Justice CORLETT.

On account of the decision of this court in the case of *Goodrich v. Pennsylvania and New York Canal and Railroad Company* (29 Hun, 50), which is in principle the same as this, we should, I think, affirm the judgment, irrespective of the reasons hereinafter expressed. There is also language used by the Court of Appeals in *Nolan v. Brooklyn City and Newtown Railroad Company* (87 N. Y., 67), which though possibly, as is claimed by appellant, not necessary to the decision of that case, cannot be ignored by us. There Judge FINCH says : " The rule is settled that, independent of the mandate of the statute, * * * it is not, even in the case of steam cars, negligence *per se* for a passenger to stand on the front platform of a moving car," referring to those cases where the passenger was unable to procure a seat within the car.

But I think it extremely doubtful if the statute (Laws of 1850, § 46, chap. 140), known as the general railroad act, and the regulations thereunder made by the defendant, are applicable to the case of a passenger passing carefully upon a lawful errand from one car to another while the train is in motion. The language of the statute is : " In case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the

injury; provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers."

The language there used is broad enough to include passengers in getting on and off the cars at proper times and places. But, clearly, no such construction can be put upon the statute, notwithstanding the comprehensiveness of the words used "while on the platform of a car," etc. A passenger must pass upon the platform both in getting on and getting off the train. If, while in that act, he is injured, say by the giving away of the platform, could it be reasonably contended that there could be no recovery because he was "injured while on the platform," and while there was sufficient room inside the cars for the proper accommodation of passengers? The question is not debatable, though the words in a literal sense would in the case supposed exempt the company from liability.

The true meaning of this section is, that the passenger shall not stand or remain on the platform while the cars are in motion, when there is sufficient accommodation inside the car. It does not make the presence of the passenger on the platform *per se* an act of negligence, and such has been its practical construction and application by railway companies. The regulation of this defendant, posted inside its cars, printed on metal, is as follows: "Passengers are not allowed to stand on the platform."

Passing from one car to another while in motion is not of itself a violation of these regulations. In so doing it may well be conceded that even outside the statute the passenger takes upon himself the ordinary hazards attending the act, such as the perils of the lurching and jerking of the train, of the elements, of his own misstep or want of nerve and other like hazards. But I am not prepared to hold that his presence on the platform while returning from the smoking car, where he went to smoke, to his seat in another coach, when the train was running at its usual speed, is *per se* such a reckless act as to absolve the defendant from the duty of furnishing couplings sufficient to hold the cars together, thus by its negligence adding to the well-known and ordinary perils of transit the unknown and extraordinary, namely, the omission of duty of the company to provide suitable and proper appliances for holding the cars together, a failure of obligation to the public which is

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inexcusable under the law governing the liability of common carriers of passengers for hire. In my judgment, the jury was justified by the evidence in finding that, except for the defective couplings, the plaintiff's intestate would have passed in safety from the one car to the other.

The judgment should be affirmed.

Judgment and order appealed from affirmed.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
THE NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY, APPELLANT, v. THE BOARD
OF HEALTH OF THE TOWN OF SENECA FALLS,
RESPONDENT.

Board of health—power of, to direct the abatement of a nuisance, without giving notice to the party charged with maintaining it.

The Board of Health of the Town of Seneca Falls, acting under chapter 270 of the Laws of 1885, as amended by chapter 809 of the Laws 1888, made an order without notice to a railroad company, requiring the latter to make two openings of a hundred feet each, in an embankment extending from the west shore of Cayuga lake, upon which it operated a railroad, so as to permit the free flow of the waters of the lake through them northwardly.

Held, that the duties of the board, in respect to inquiring into and determining whether or not a nuisance existed, were of a *quasi* judicial nature, and that the omission to give notice to the railroad company of the action proposed to be taken, was fatal to the regularity of the proceedings.

That the power given to the Board of Health, by subdivision 4 of section 8 of the said act, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances," etc., by necessary implication, required the board to give a reasonable notice to the person who was charged with the maintenance of a nuisance that complaint had been made, or that such fact existed, so that he might be heard, in his own behalf, in refutation of the charge made against him.

In the absence of any prescribed length of notice a reasonable opportunity is implied, and should be afforded to the party charged with maintaining a nuisance, to defend his conduct.

APPEAL by the relator, the New York Central and Hudson River Railroad Company, from an order made at a Special Term, held in the city of Rochester on the 30th day of June, 1890, and entered

in the Seneca county clerk's office, July 2, 1890, vacating and setting aside, with ten dollars costs, a previous order of the Special Term, granted March 21, 1890, which latter order directed that a writ of *certiorari* issue, directed to the Board of Health, and the members thereof, of the town of Seneca Falls, in the town of Seneca, to review its action; and, further, that all proceedings on the part of said Board of Health to remove the nuisance complained of in the papers annexed to the petition, upon which such order was made, or in any way to interfere with, change, alter, modify or remove the embankment of the petitioner, be stayed.

The order appealed from vacated the injunction and the writ of *certiorari* granted by the aforesaid order of March 21, 1890.

Camp & Dunwell, for the appellant.

C. A. MacDonald, for the respondent.

MACOMBER, J.:

The Board of Health of the Town of Seneca Falls, on the 7th day of November, 1889, made an order, without notice to the relator, requiring the latter to make two openings of a hundred feet each in the embankment extending from the west shore of Cayuga lake, upon which it operates a railway, so as to permit the free flow of the waters of the lake through them northward. The board further directed that, in case the relator should fail to comply with said order, the work should be done under the direction of such board and the expense thereof assessed upon the relator's property. The motion at Special Term having been made, alone, upon the papers on which the writ was issued, the affidavit of the relator's assistant-engineer used on the original application, to the effect that such expenses to the railroad company would be \$70,000 or \$75,000 stands uncontradicted.

The ground upon which such action was taken is stated in the resolutions of the Board of Health to be, that this embankment caused an impediment in the current or natural flow of the waters and made a deposit of sediment and decaying vegetable matter, and the formation of marshes and a thick growth of weeds, grass and flag along the west shore of the lake at that point detrimental to the health of the community.

This embankment had existed, substantially in the condition in which it was at the time the Board of Health took this action, for a period of forty-two years. The relator has maintained embankments from both shores of the neck of this lake, but the same were connected by a bridge over the middle, resting upon stone cribs, between which are openings at intervals for a distance, in the whole, of 1,522 feet, through which the waters of the lake freely flowed towards the north. Shortly prior to the action of the Board of Health the railroad company began the construction of a new bridge, by which the openings between the cribs through this space of 1,522 feet would be lessened in extent and reduced to a distance of 611 feet in the clear. By this improvement, which materially lessened the number of feet through which the waters of the lake flowed northward, the pre-existing cribs, located at intervals through the 1,522 feet, were dispensed with; so that, under the facts disclosed in the papers, the flow of the lake would not be retarded by the change.

It is further claimed on behalf of the relator that, if there is any obstruction to the free passage of the waters, the same is caused by reason of certain structures made by the State in the vicinity of Mud Lock on the Seneca canal, below the relator's bridge, where all the waters of the lake are required to flow through a space of 252 feet.

It is not necessary to go into all the facts claimed to exist, as stated in the petition and affidavits; for, if the conclusion to which we have arrived is correct, the merits of the case are not necessarily before us, but they may be presented to the court in a subsequent step in this or in some other proceeding.

It is established, without dispute, that the action taken by the defendant was without notice to the relator. This omission we deem to be fatal to the regularity of the proceeding and to cause a reversal of the order appealed from. The proceeding is instituted pursuant to chapter 270 of the Laws of 1885, which was amended by chapter 309 of the Laws of 1888, in particulars not material to this appeal. Under subdivision 4 of section 3, the board of health of towns has power "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances, or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions, dangerous to life and health, are known or

believed to exist, and by appointed members or persons to inspect and examine the same, and all owners, agents and occupants shall permit such sanitary examination; and said board of health shall furnish said owners, agents and occupants a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction."

By subdivision 6 of the same section, the board has power to make such order and regulation in special or individual cases, not of general application, as it may see fit, concerning the suppression and removal of nuisances and concerning all other matters in its judgment detrimental to public health. By subdivisions 8 and 9 it has power to employ necessary persons to carry its orders into effect and to impose penalties for the violation thereof. Section 4 makes willful violation of such orders a misdemeanor, and in addition thereto, in case of non-compliance therewith, the board may enter the premises and abate the alleged nuisance and may recover the expense thereof from the persons maintaining such nuisance.

That the writ of *certiorari* may be issued in a case of this character admits of no doubt. Section 2120 of the Code of Civil Procedure preserves the writ as it existed at common law, except where expressly taken away by statute. So far as the board of health could render its determination upon the matters before it, the decision which it made was a final adjudication from which no appeal could be maintained by the relator, and hence the case is not brought within one of the exceptions to the rule. (Id., § 2122; *Stone v. Mayor, etc.*, 25 Wend., 167.)

The duties of the board in respect to inquiring into and determining whether or not a nuisance existed are *quasi* judicial in their nature, and it is the duty of this court to determine, by means of such writ, whether jurisdiction was obtained by the board of health, and whether the authority conferred upon it has been pursued in the mode required by law in order to authorize it to make the determination. (Code, § 2140, subs. 1, 2, 3.)

Without any notice, the defendant has taken steps which, if legal, will cause a great expense to the relator. While it may be true that a suit in equity to restrain the defendant from proceeding

further with its illegal acts might be maintained, yet that additional remedy of the aggrieved party is no obstacle to the validity and regularity of the writ in this instance. But the appellant's counsel carry their contention too far. It is claimed by them that the act under which the board of health has proceeded is unconstitutional, being in violation of the provisions of the Constitution, that no person shall be deprived of life, liberty or property without due process of law. In this, however, we think they are in error. This act did not undertake to give the entire procedure necessary to charge any person with the offense of maintaining a nuisance. Had it declared that such a proceeding could be maintained without notice to the parties most interested therein, then the question of its constitutionality would have fairly arisen and would have been easily decided. It was similarly attempted to be raised in the case of the *Metropolitan Board of Health v. Heister* (37 N. Y., 661). But such folly cannot be ascribed to it. Though no special provision is made in the act for notice to the offending party, yet the power given to the board by subdivision 4 of section 3, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances," etc., requires, by necessary implication, the board to give a reasonable notice to the person against whom the maintenance of the nuisance is alleged, that complaint has been made or that such fact exists, so that he may be heard in his own behalf and, if possible, to refute the charge made against him. No proper inquiry leading to a final order affecting private rights can be made without hearing both sides. The opportunity to be heard before condemnation is the right which every person has under the common law and under our Constitution. So firmly is this fundamental principle embedded in our judicature, that it is not necessary, even in acts in derogation of the common law, to prescribe in words that notice of the hearing to a party proceeded against shall be given. In the absence of any prescribed length of notice, a reasonable opportunity is implied and must be afforded him to defend his conduct. Such notice will vary in length according to the circumstances and exigencies of each particular case.

While it is true that the board of health may, and in certain instances it should, in the discharge of its public duties, make *ex parte* examinations, yet, before a final determination is made

which will put the accused person to expense, or which will deprive him of his right to carry on his business, he should be apprised of the substance of the charge, and thus be enabled to defend himself before final judgment. If the material parts of the petition and affidavits upon which the writ of *certiorari* was granted are true (as we must deem them to be for all purposes of this appeal), a wrong has been perpetrated upon the relator, by the proceeding complained of, under which it could not safely rest; for, in the absence of a reversal of the board's determination for its entire illegality, or the permanent restraint by the court against its being carried into effect, the property rights of the relator would be seriously imperiled.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to vacate the writ of *certiorari* denied, with ten dollars costs.

DWIGHT, P. J., and CORLETT, J., concurred.

Order appealed from reversed, with ten dollars costs and disbursements, and the motion to supersede the writ of *certiorari* denied, with ten dollars costs.

NOTE.— The rest of the cases of this term, which are to be reported, with the list of decisions of those cases decided and not reported, will be found in the next volume (59) of Hun.— [REP.]

DECISIONS IN CASES NOT REPORTED.

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Alexander J. Briggs, Appellant, v. Lyman Ayrault and others, Respondents.—Order appealed from affirmed, with ten dollars costs and disbursements. *Collins v. Beebe* (27 N. Y. State Rep., 4) followed.

The Citizens' Bank of Perry, Respondent, v. Helen A. Williams and another, Appellants.—Reargument ordered. Macomber, J., taking no part.

The People of the State of New York, Respondent, v. Harry Bradley, Appellant.—Judgment and order appealed from affirmed and the case remitted to the Court of Sessions of Allegany county to proceed thereon. Opinion by Corlett, J.

The Village of Corning and others, Respondents, v. The Rector, etc., of Christ Church of Corning and others, Appellants.—Judgment affirmed, with costs. Opinion by Macomber, J.

Edward Fay, Respondent, v. The Town of Lindley, Appellant.—Judgment and order appealed from affirmed. Opinion by Corlett, J.

Johannah Sheldon, Respondent, v. William B. Sheldon and another, Executors, Appellants.—Judgment and order appealed from affirmed, with costs. Opinion by Dwight, P. J.

Enos G. Laney, Individually and as Administrator, Respondent, v. Mary K. Laney, Appellant.—Interlocutory judgment and order appealed from affirmed, with costs. Opinion by Corlett, J.

Carrie C. Fowler, Respondent, v. William P. Fowler, Appellant.—Interlocutory judgment appealed from affirmed, with costs. Opinion by Dwight, P. J.

Charles V. Whittin and others, Appellants, v. John C. Fitzwater, Respondent.—Judgment and order appealed from affirmed. Opinion by Macomber, J.; Dwight, P. J., dissents on the ground of error in the charge on the question of intent at the time of the receipt of the goods.

William J. Lord and another, Appellants, v. John Z. Lord, Respondent.—Judgment of the County Court affirmed, with costs. Opinion by Dwight, P. J.

Rufus Scofield and another, Executors, etc., Respondents, v. Althea A. Moore, Appellant.—Judgment appealed from affirmed. Opinion by Macomber, J.

Dwight Babcock, Appellant, v. Martin V. Benson and others, Executors, etc., Respondents.—Order appealed from reversed and a new trial granted before another referee, with costs to the appellant, to abide the final award of costs. Opinion by Dwight, P. J.

Otto Kelsey, Administrator, Appellant, v. Frederick H. Cooley, Respondent, Impleaded, etc.—Judgment appealed from affirmed, with costs. Opinion by Corlett, J., Macomber, J., not sitting.

Otto Kelsey, Administrator, with will annexed, Appellant, v. William R. McNair, Respondent.—Judgment appealed from affirmed, with costs. Opinion by Dwight, P. J.

Albert G. Graham, Appellant, v. George Richardson, Executor, Respondent.—Judgment and order appealed from affirmed. Opinion by Macomber, J.

Albertus Larowe, Appellant, v. Herman J. Lewis and others, Respondents.—Judgment affirmed. Opinion by Corlett, J.; Dwight, P. J., not voting.

Hiram Davis, Appellant, v. John W. Campbell and others, Respondents.—Judgment appealed from affirmed, with costs, on opinion delivered at special Term.

Henry Oberlies, Plaintiff, v. Balthasar Bullinger, Defendant.—Motion for a new trial denied, with costs, and judgment ordered for the defendant upon the nonsuit. Opinion by Macomber, J.

Frederick Kleinhaus, Appellant, v. Charles L. Whiting and others, Respondents.—Order appealed from reversed, with ten dollars costs and disbursements, for the reason that all the matters in issue arose in Monroe county. Dissenting opinion by Corlett, J.

In the Matter of the Application of The Rochester and Glen Haven Railroad Company, Respondents, to Acquire Lands of Ferdinand and Barbara Griebel, Appellants.—Order of Special Term reversed, with ten dollars costs and disbursements, and application denied, with costs, on the grounds stated in the opinion of the referee.

Frank K. Speth, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order appealed from affirmed. Corlett, J., not sitting.

Thomas Collins, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order appealed from affirmed. Opinion by Macomber, J.; Corlett, J., not sitting.

George W. Cole, Respondent, v. Sidney B. Roby, Appellant.—Judgment and order appealed from reversed and a new trial granted, with costs to the appellant to abide the event.—Opinion by Corlett, J.

James H. King and another, Appellants and Respondents, v. The Union Iron Company of Buffalo and another, Respondents and Appellants.—Judgment appealed from affirmed, without costs to either party. Opinion by Macomber, J.

Louisa A. Springer, Respondent, v. The Anglo-Nevada Assurance Corporation, Appellant.—Judgment and order appealed from affirmed. Opinion by Corlett, J.

Peter Garlock, Executor, etc., and as Administrator, etc., Appellant, v. Ella Vandevort and Gilbert M. Vandevort, in his own right and as Executor, Respondent.—Judgment appealed from affirmed, with costs, on opinion delivered at Special Term.

In the Matter of the Accounting of Peter Garlock, one of the Executors, etc., of Thomas Vandevort. Peter Garlock, Appellant.—Order and decree of surrogate of Ontario county modified so as to make the disbursements of both parties on the reference payable out of the estate, and, as so modified, affirmed, with costs of this appeal to the appellant Garlock, payable out of the estate. Opinion by Dwight, P. J.

George D. Smith, Plaintiff, v. M. Edwin Servis, Defendant.—Motion for a new trial denied,

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- with costs, and judgment ordered for the defendant on the nonsuit. Opinion by Macomber, J.
- William S. Servis, Appellant, v. George Holwede and others, Respondents.—Judgment appealed from affirmed, with costs. Opinion by Corlett, J.
- The People of the State of New York, Respondent, v. John Dewey, Appellant.—Judgment and conviction affirmed and case remitted to the Court of Sessions of Erie county with directions to proceed thereon. Opinion by Dwight, P. J.
- Frances A. Hess and another, Appellants, v. The Washington Fire and Marine Insurance Company, Respondent.—Judgment affirmed. Opinion by Macomber, J.
- Benjamin Decker, Respondent, v. G. Clinton Gardner, Receiver, etc., Appellant.—Judgment appealed from affirmed. Opinion by Corlett, J.; Dwight, P. J., not voting.
- The People of the State of New York, Respondent, v. Nathan Terrell, Appellant.—Judgment and conviction reversed and a new trial granted, and the case remitted to the Court of Sessions of Steuben county to proceed thereon. Opinion by Corlett, J.
- Henry W. Wedge, Respondent, v. James W. McMahon and another, Appellants.—Order appealed from affirmed, without costs, and judgment ordered for plaintiff on the verdict. Opinion by Dwight, P. J.
- Chauncey Abbey, Appellant, v. Bradford Taber and Wife and Mary Taber and others, Appellants and Respondents.—Judgment appealed from affirmed, with costs. Opinion by Macomber, J.
- The People of the State of New York, Respondent, v. John W. Gillette, Appellant.—Judgment appealed from affirmed. Opinion by Dwight, P. J.
- Ellen S. Graham, Administratrix, etc., Respondent, v. George D. Chapman, Receiver, etc., of the L. and P. R. R. Co., Appellant.—Judgment and order appealed from affirmed. Opinion by Macomber, J.
- Margaret McDermott, Respondent, v. James Conley, Appellant.—Judgment and order of the County Court of Yates county affirmed, with costs. Opinion by Corlett, J.
- Thomas Ashberry, Respondent, v. Town of West Seneca, Appellant.—Judgment and order appealed from affirmed. Opinion by Macomber, J.; Corlett, J., not sitting.
- Henry F. Hart and others, Executors, etc., Respondents, v. George S. Riley, Appellant, Impleaded, etc.—Judgment appealed from affirmed, with costs. Opinion by Dwight, P. J.
- Horace L. Lewis, Respondent, v. Joshua Van Keuren, Appellant.—Judgment of Steuben County Court, affirming judgment of a justice of the peace, affirmed, with costs.
- Joshua Van Keuren, Appellant, v. Frank Switzer, Respondent.—Judgment of County Court of Steuben county appealed from affirmed, with costs. Opinion by Corlett, J.
- Nellie Arnett, Administratrix, etc., Respondent, v. Ezekiel M. Hill and another, Appellants.—Judgment appealed from reversed and reference vacated and a new trial ordered before a jury at the circuit, on issues to be framed under the direction of the Special Term. Opinion by Macomber, J.; Dwight, P. J., dissents.
- Ida C. Kurz, Respondent, v. Henry Fish, Appellant, Impleaded, etc.—Order appealed from affirmed, with ten dollars costs and disbursements. Opinion by Corlett, J.
- Wells Paine, Respondent, v. Jeremiah W. Chandler, Appellant.—Judgment appealed from affirmed, with costs, on opinion delivered at Special Term.
- John Dobson and another, Respondents, v. Lucius B. Warner, Appellant.—Judgment appealed from affirmed. Opinion by Macomber, J.
- David K. Bell and others, Constituting Board of Health of the Town of Brighton, Respondent, v. City of Rochester, Appellant.—Judgment appealed from affirmed, with costs. Opinion by Macomber, J.
- Frederick Goetzman and others, Respondents, v. Irod C. Gallup, Appellant.—Order of Monroe County Court appealed from affirmed, with ten dollars costs and disbursements.
- In the Matter of the Probate of the Alleged Will of Potter Austin, Deceased, Granger Griswold, Executor, Proponent and Appellant, v. Jonathan Austin and others, Contestants and Respondents.—Decree of surrogate of Livingston county reversed on question of fact and trial by jury ordered at the Livingston Circuit, with costs of this appeal to abide the final award of costs. Order to be settled by Macomber, J.
- Edwin K. Burnham and another, as Executors, Respondents, v. Amos H. Cobb, Appellant.—Order appealed from affirmed, with ten dollars costs and disbursements.
- La Fayette Cole, Respondent, v. The Fall Brook Coal Company, Appellant.—Motion for a reargument denied. Order of this court modified by inserting that the same is without prejudice to the defendant's renewal of its motion at Special Term on new papers.
- George W. Wells, Appellant, v. Rufus A. Sibley and others, Respondents.—Motion for reargument denied. Macomber, J., not sitting.
- Herbert R. Ward, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Motion for leave to appeal to the Court of Appeals denied upon the merits, and not upon the ground of alleged laches in making the motion.
- Matter of Lewis H. Clark, Taxpayer, etc., Respondent, v. Andrew F. Sheldon, County Treasurer, Appellant.—Motion for leave to appeal to the Court of Appeals by either party granted.
- Pliny T. Sexton, Respondent, v. Henry Breese, Appellant.—Motion for leave to appeal to the Court of Appeals granted. Macomber, J., taking no part.
- Matter of Accounting of John H. Hopkins, Executor, etc.—Motion for reargument denied.
- Charles D. Thompson, Respondent, v. Alexander McLane and others, Appellants.—Reargument ordered and the case sent back for resettlement so as to show distinctly what quantity of apples was retained by the plaintiff in replevin.
- William J. Byam, Appellant, v. Fremont Hampton, Respondent.—Motion for leave to appeal to the Court of Appeals denied.
- City of Rochester, Respondent, v. Benjamin Simpson, Appellant.—Motion for leave to appeal to the Court of Appeals granted.
- Andrew Totten, Respondent, v. The New York, Lake Erie and Western Railroad Company, Appellant.—Motion for reargument or for leave to appeal to the Court of Appeals denied.
- James Becker, Respondent, v. The New York, Lake Erie and Western Railroad Company, Appellant.—Motion for leave to appeal to the Court of Appeals denied.
- The Town of Ontario, Appellant, v. Francis A. Hill, Supervisor, etc., Respondent.—Judgment appealed from reversed and a new trial granted, with costs to abide the final award of costs. Opinion by Lewis, J.; dissenting opinion by Corlett, J.
- Emeline C. Fargo, Respondent, v. John M. Fargo and others, Appellants.—Judgment appealed from reversed, and a new trial granted before another referee, with costs to abide the event.
- Austin B. Hathaway, Respondent, v. Orient Insurance Company, Appellant.—Judgment appealed from affirmed. Opinion by Corlett, J.
- Mary Mulligan as Administratrix, etc., Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order appealed from reversed, and a new trial granted, with costs to abide the event. Opinion by Dwight, P. J.; dissenting opinion by Corlett, J.

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FIRST DEPARTMENT, OCTOBER TERM, 1890.

Decisions handed down October 7, 9, 15, 1890.

Lillian Stahl v. Richard Stahl.—Motion denied, with ten dollars costs.
 Ann Farmer v. Emigrant Industrial Savings Bank.—Motion dismissed.
 Emeline E. Youngs v. Thomas H. Borden.—Motion dismissed.
 Charles E. Rhineland v. New York Elevated Railway Company.—Motion denied.
 George Munro v. O. G. Smith and others.—Motion denied.
 Edward Schell v. The Mayor, etc., of the City of New York.—Motion denied.
 In the Matter of Frank H. Gray, etc.—Motion granted, with ten dollars costs.
 In the Matter of Charlotte Kean, Deceased.—Motion for leave to go to Court of Appeals granted and order signed.
 In the Matter of George W. McLean v. Maurice Mansell.—Motion granted unless appellant stipulates to argue appeal at November Term and pay ten dollars costs of motion.
 Edward K. Collins v. Sarah J. Collins.—Motion denied upon plaintiff stipulating to argue appeal at November Term.
 Thomas Makin v. Frederick A. Blossom.—Motion granted, with ten dollars costs.
 Sixth Avenue Railroad Company v. Metropolitan Elevated Railroad Company.—Application denied, with costs.

Decisions handed down October 24, 1890.

William T. Pitt, Appellant, v. Charles Kellogg, Respondent.—Order affirmed, with costs. Opinions by Daniels, J., and Van Brunt, P. J.
 Julia L. Ellis, Appellant, v. The Mayor, etc., Respondent.—Interlocutory judgment affirmed. Opinion by Daniels, J.
 In the Matter of the Judicial Settlement of the Accounts of George A. Powers, Executor, etc.—Decree affirmed, with costs. Opinion by Daniels, J.
 Kokomo Strawboard Company, Respondent, v. Horace Inman and another, Appellants.—Judgment affirmed upon opinion of referee. Opinion *Per Curiam*.
 Illinois Watch Company and others, Respondents, v. May L. Payne and others, Appellants.—Judgment affirmed as to defendants May L. Payne and Augusta L. Bamber, but reversed as to defendant Louise Neillis; new trial ordered and costs to her to abide event.—Opinion by Daniels, J.; dissenting opinion by Van Brunt, P. J.
 The Postal Telegraph Cable Company, Appellant, v. Hugh J. Grant, Sheriff, etc., Respondent.—Judgment affirmed, with costs. Opinion *Per Curiam*.
 Patrick Kenney, Respondent, v. The Ocean Steamship Company of Savannah, Appellant.—Judgment reversed and new trial ordered, with costs to appellant to abide event. Opinion by Van Brunt, P. J.
 The People of the State of New York, Appellant, v. Mark Mayer, Respondent.—Appeal dismissed. Opinion by Van Brunt, P. J.
 The People of the State of New York, Respondent, v. Robert H. Spriggs Appellant.—Judgment affirmed. Opinion by Brady, J.
 William H. Thomas and others, Respondents, v. Henry A. Dickerson and others, Appellants.—Order reversed, with ten dollars costs and disbursements, and the attachment vacated. Opinion by Daniels, J.
 Christian Eberspacher, Appellant, v. Leopold Boehm, Respondent.—Order affirmed, with ten dollars costs and disbursements. Opinion by Daniels, J.

The People of the State of New York, Respondent, v. Louis Aldrich, Appellant.—Judgment reversed and a new trial ordered. Opinion by Daniels, J.
 William A. Barwick, Respondent, v. The Gast Lithographic and Engraving Company, Appellant.—Judgment and order affirmed. Opinion by Daniels, J.
 The People of the State of New York *ex rel.* D. Willis James and others v. Edward Gilon and others, Assessors, etc.—Proceedings reversed as stated in opinion. Opinion by Daniels, J.; Van Brunt, P. J., dissents.
 David R. Paige and others v. The Mayor, etc. Herman Clark and others, Appellants, v. Abraham S. Jackson, Respondent.—Judgment affirmed. Opinion by Daniels, J.
 The People of the State of New York *ex rel.* Chester L. Sciford v. Charles F. MacLean and others.—Proceedings reversed and relator restored, with costs. Opinion by Van Brunt, P. J.
 Blanche L. Andrews v. William C. Brewster and others.—Judgment, as modified by opinion, affirmed, without costs of this appeal. Opinion by Van Brunt, P. J.
 Samuel M. Lederer, Appellant, v. Thomas D. Adams, Respondent.—Order affirmed, with ten dollars costs. Opinion by Brady, J.
 Hamlin Babcock, Appellant, v. John Stimmel, Respondent.—Judgment reversed, new trial ordered, costs to appellant to abide event. Opinion by Daniels, J.
 Robert F. Farrell, as President, etc., Appellant, v. Louis Cook and others, Respondents.—Judgment affirmed, with costs. Opinion by Daniels, J.
 George J. Grossman, Respondent, v. Richard N. Walters and another, Appellants.—Judgment reversed, new trial ordered, costs to abide event, unless plaintiff stipulate to reduce judgment as mentioned in the opinion; in which case judgment, as so modified, affirmed, without costs. Opinion by Daniels, J.
 Laura M. Thorp, Appellant, v. Thomas D. Adams, Respondent.—Order affirmed, with ten dollars costs. Opinion by Brady, J.
 The People of the State of New York *ex rel.* Denis J. Mahoney v. Charles F. MacLean and others.—Proceedings affirmed and writ dismissed. Opinions by Van Brunt, P. J., Brady and Daniels, JJ.; Brady, J., dissenting.
 Charles F. Matlage, Respondent, v. The New York Elevated Railroad Company and others, Appellants.—Judgment affirmed, with costs. Opinion by Daniels, J.
 Riverside Bank, Appellant, v. John Totten, Respondent, Impleaded, etc.—Judgment affirmed. Opinion by Daniels, J.
 John E. Ackerman and others, Appellants, v. The Astoria Veneer Mills and Lumber Company, Respondent.—Judgment and order affirmed. Opinion by Daniels, J.
 Hannah Nirdlinger and others, Respondents, v. Isaac Bernheimer, Appellant.—Judgment reversed and new trial ordered, with costs to appellant to abide event. Opinion by Van Brunt, P. J.; dissenting opinion by Daniels, J.
 Susan Jefferson, Jr., and others, Respondents, v. The New York Elevated Railroad Company, Appellant.—Judgment affirmed, with costs. Opinion by Daniels, J.
 George Huber, Respondent, v. William H. Wilson, Appellant.—Judgment and order affirmed. Opinion by Daniels, J.
 John H. Stallman and others, Appellants, v. Agnes L. Kimberly and others, Respondents.—Order affirmed, with ten dollars costs and disbursements. Opinion by Daniels, J.
 Empire Paving, etc., Company, Respondent, v.

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- Thomas J. Robinson, Appellant, Impleaded, etc.—Order reversed, with ten dollars costs and disbursements, and motion denied, and the bond given under order to be canceled. Opinion by Daniels, J.
- Franklin Allen and others, Executors, etc., Appellants, v. Charles M. Stead, Respondent, Impleaded, etc.—Order modified as directed in opinion, and, as modified, affirmed, without costs of the appeal. Opinion by Daniels, J.
- Charles F. Starr, Appellant, v. Charles G. Patterson, Respondent.—Order affirmed, with ten dollars costs and disbursements. Opinion by Van Brunt, P. J.
- Frank Ross, Administrator, etc., Respondent, v. Wallace P. Willett and others, Appellants.—Order modified as directed by opinion, and, as modified, affirmed, without costs of the appeal. Opinion by Daniels, J.
- Benjamin Barker, Jr., as Assignee, etc., Plaintiff, v. Erastus Crawford and others, Defendants.—Order affirmed, with ten dollars costs and the disbursements of the appeal. Opinion by Daniels, J.
- The People of the State of New York *ex rel.* John F. Cline v. J. Hampden Robb and others, Respondents.—Writ dismissed and judgment of commissioners affirmed. Opinion by Brady, J.
- In the Matter of the Estate of Samuel Lyman, Deceased.—Order affirmed, with ten dollars costs and disbursements. Opinion by Brady, J.
- Metropolitan Elevated Railway Company, Respondent, v. Charles Duggin and others, Appellants.—Order affirmed, with ten dollars costs and disbursements. Opinion by Daniels, J.
- Franklin Allen and others, Executors, Respondents, v. Harry Allen and others, Appellants.—Order modified as directed in opinion, and, as modified, affirmed, with ten dollars costs and disbursements, to abide the result of this action. Opinion by Daniels, J.
- In the Matter of John E. Murray, an Attorney.—Motion granted forever disbarring the respondent as an attorney or counselor of this court. Opinion *Per Curiam*.
- In the Matter of the Accounting of Executors of Benjamin A. Kavanagh, Deceased.—Motion denied.
- Ann E. Wynkoop, Appellant and Respondent, v. Mary S. Van Buren and others, Respondents and Appellants.—Order modified as directed in opinion, and, as modified, affirmed. Opinion by Van Brunt, P. J.
- Ann E. Wynkoop, Appellant and Respondent, v. Mary S. Van Buren, Respondent and Appellant.—Motion to dismiss appeal denied, without costs.
- Thomas Cavanagh, as Administrator, Respondent, v. Oceanic Steam Navigation Company, Appellant.—Order reversed, so far as it refuses to strike out the denial of the fourth allegation of the answer, and affirmed in respect to denial of third allegation of answer, without costs. Opinion by Van Brunt, P. J.
- Almira R. Clare, Respondent, v. Edward W. Crittenden, Appellant.—Order affirmed, with ten dollars costs and disbursements. Opinion *Per Curiam*.
- The People of the State of New York *ex rel.* Daniel Brooks v. Charles F. MacLean.—Judgment affirmed and writ dismissed. Opinion by Van Brunt, P. J.
- The People of the State of New York *ex rel.* Thomas Dermody v. John McClave and others.—Proceedings affirmed and writ dismissed, with costs. Opinion by Van Brunt, P. J.
- Archibald C. Haynes, Respondent, v. J. Blakeley Creighton, Appellant.—Order reversed and motion denied, without costs, but with the disbursements on the appeal to the defendant. Opinion by Daniels, J.
- Thomas Vernon and others, Respondents, v. J. Blakeley Creighton, Appellant.—Order reversed, without costs, but with the disbursements on appeal in favor of defendant appealing. Opinion by Daniels, J.
- John H. Hollander, Appellant, v. Henry C. Hall, Respondent.—Order affirmed, with ten dollars costs and disbursements. Opinion by Daniels, J.
- The People of the State of New York *ex rel.* Philip Farley v. Charles F. MacLean and others.—Judgment affirmed. Opinion by Daniels, J.
- In the Matter of Application of Mary A. Beebe, etc.—Order affirmed, with ten dollars costs and disbursements. Opinion by Van Brunt, P. J.
- Percival Everitt, Respondent, v. The Everitt Manufacturing Company, Defendant.
- Isaac F. Denzl and another, Attaching Creditors, Appellants.—Order affirmed, with ten dollars costs and disbursements. Opinion by Van Brunt, P. J.
- In the Matter of the Estate of McQueen.
- Pandoris v. McQueen.—Order modified as directed in opinion, and as modified affirmed. Opinion by Van Brunt, P. J.
- John M. Jones and others, Plaintiffs, v. Henry J. Newton, Assignee, and others, Defendants.—Taxation reduced to seventy-eight dollars and affirmed for that amount. Opinion by Van Brunt, P. J.
- Clemens Muller, Respondent, v. Charles F. Post, Appellant.—Order modified as mentioned in opinion, and as modified affirmed, without costs. Opinion by Van Brunt, P. J.
- Martha A. Ferguson and others, Plaintiffs, v. Mary Isabelle Nelson, Defendant.—Exceptions sustained and motion for new trial granted, with costs to defendant to abide event. Opinion by Van Brunt, P. J.
- In the Matter of the Estate of McQueen — Keane v. McQueen.—Order modified as mentioned in opinion, and as modified affirmed. Opinion by Van Brunt, P. J.
- John R. Drake, Appellant, v. Stewart L. Woodford, Respondent.—Order affirmed, with ten dollars costs and disbursements. Opinion by Van Brunt, P. J.
- The People of the State of New York *ex rel.* John P. Rouse v. Stephen B. French and others. Writ dismissed. Opinion by Brady, J.
- James E. Eggleston, Appellant, v. Miles Beach, Respondent.—Order affirmed, with ten dollars costs and disbursements. Opinion by Van Brunt, P. J.
- George B. Heath, Appellant, v. The Metropolitan Exhibition Company, Respondent.—Judgment affirmed. Opinion by Daniels, J.; dissenting opinion by Brady, J.
- In the Matter of the Application of the Mayor, etc., relative to new Parks, etc.
- In re Tier.—Motion denied.
- Frank Work and others, Respondents, v. Cyrus W. Rexford, Appellant, Impleaded, etc.—Order affirmed, with ten dollars costs and disbursements. Opinion by Van Brunt, P. J.

THIRD DEPARTMENT, NOVEMBER TERM, 1890.

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Stephen Van Rensselaer, Appellant, v. Egbert S. Wright, Respondent.

Same v. John Jost Shafer, Respondent.—Motion for reargument denied, with ten dollars costs. Opinion by Learned, P. J.

The People of the State of New York, Appellant, v. The Manhattan Mutual Insurance Company of Goshen, N. Y., Respondent.—Order reversed. Final order reserved until February General Term, at which defendant, on notice, may show repayment of capital. Opinion by Landon, J.

Alice V. Wooster, Plaintiff, v. James N. Case and others, Defendants, and three other cases.—Order reversed, without costs, and with leave to plaintiff in first action to renew her motion as she may be advised. Opinion by Learned, P. J.

The Round Lake Association, Respondent, v. Bradford R. Kellogg and others, Appellants.—Order for injunction reversed, with ten dollars costs and printing disbursements, and motion for injunction denied, with ten dollars costs. Opinion by Learned, P. J.

William Collins, Assignee, Appellant, v. Elisha W. Hydorn and others, Respondents.—Judgment affirmed, with costs. Opinion by Landon, J.; Mayham, J., not acting.

Bridget Jordan, Appellant, v. Anastatia Gage and others, Respondents.—Order affirmed, with ten dollars costs and printing disbursements. Opinion by Landon, J.

Thomas S. Vaughn, Appellant, v. Mary M. Strong, Administratrix, Respondent. Nannie L. Vaughn, Appellant, v. Mary M. Strong, Administratrix, Respondent.—Judgment reversed, new trial granted, referee discharged, costs to abide event. Opinion by Mayham, J.

George H. Walden, Appellant, v. Perry W. Eldred, Respondent.—Judgment affirmed, with costs. Opinion by Mayham, J.

Pauline Friedlander, Appellant, v. The President etc., of the Delaware and Hudson Canal Company, Respondent.—Judgment affirmed on opinion below, with costs.

John D. Spicer and others, Respondents, v. Edward Snyder, Appellant.—Judgment reversed unless plaintiff stipulate to reduce recovery to \$873.63, with interest and costs, and, if he so stipulate, then affirmed as so modified, with costs. Opinion by Landon, J.

Thomas Costello, Appellant, v. George B. Eddy, Respondent.—Judgment affirmed, with costs. Opinion by Mayham, J.

Hiram Miller, Respondent, v. Henry R. Pierson and others, Appellants.—Judgment affirmed, with costs.

Jesse Billings, Respondent, v. The Fitchburg Railroad Company, Appellant.—Judgment and order affirmed, with costs. Opinion by Learned, P. J.

Jacob H. Snyder, Respondent, v. George H. Hearman and others, Appellants.—Order and decree of surrogate allowing Snyder's claim reversed, with costs against him, and a new trial of said claim ordered before surrogate of Rensselaer county, with such further proceedings as may be proper on determination thereof. Opinion by Landon, J.

Mary E. Abel, Respondent, v. Benjamin T. Brewster, Appellant.—Judgment reversed, new trial granted, costs to abide event. Opinion by Learned, P. J.

The Reformed Dutch Church of Summit, Respondent, v. William L. Harder and others, Appellants.—Judgment and order affirmed, with costs. Opinion by Landon, J.

Absalom W. Dieter, Appellant, v. Francis C. Fallon, Respondent.—Judgment reversed, new trial granted, referee discharged, costs to abide event. Opinion by Learned, P. J.; Mayham, J., dissenting.

Mary Fisher, Respondent, v. Niagara Fire Insurance Company, Appellant.—Judgment and order affirmed, with costs. Opinion by Mayham, J.

The Electric Construction Company, Respondent, v. Jeremiah Heffernan and others, Appellants.—Order affirmed, with ten dollars costs and printing disbursements. Opinion by Learned, P. J. John Garside, Appellant, v. The City of Cohoes, Respondent.—Order affirmed, with ten dollars costs and printing disbursements. Opinion by Landon, J.

William F. Pitkin, Administrator, Appellant, v. Eliza A. Wilcox, Administratrix, Respondent.—Order affirmed, without costs. Opinion by Mayham, J.

William R. Travis, Respondent, v. Julia A. Lee, Appellant.—Judgment reversed, with costs. Opinion by Landon, J.

James McNutt, Respondent, v. William Shafer, Appellant.—Judgment affirmed, with costs. Opinion by Learned, P. J., Mayham, J., dissenting.

Frederick R. Farwell and others, Appellants, v. Lucien J. Prescott, Respondent.—Judgment affirmed, with costs. Opinion by Landon, J.

John H. Sheehan, Appellant, v. Daniel W. Fleetham, Respondent.—Judgment reversed, new trial granted, costs to abide event. Opinion by Learned, P. J.; Mayham, J., dissenting.

The Round Lake Association, Respondent, v. Bradford D. Kellogg, Appellant.—Judgment and order affirmed, with costs. Opinion by Learned, P. J.

William H. Applebee, Respondent, v. The Albany Brewing Company, Appellant.—Judgment affirmed, with costs. Opinion by Mayham, J.

Walter Walls, Appellant, v. Thomas D. Coleman and others, Respondents.—Judgment of County Court affirmed, with costs. Opinion by Learned, P. J.

Daniel J. Terwilliger, Respondent, v. Sarah F. Beecher and others, Appellants.—Judgment reversed, new trial granted, costs to abide event. Opinion by Landon, J.

George G. Firth, Respondent, v. Cornelius Veeder, Appellant.—Judgment affirmed, with costs. Opinion by Mayham, J.

Decisions handed down December 12, 1890.

Rachael S. Lynk, by Guardian, Respondent, v. Charles Weaver, Appellant.—Order affirmed, with ten dollars costs and printing disbursements.

Abram V. Morris, Appellant, v. John McFarlan and others, Respondents.—Order affirmed, except as to the part permitting defendant to make marks on notes; as to that fact reversed, no costs.

Fred P. Allen, Assignee, etc., Appellant, v. Isaac McConihe, Respondent.—Judgment affirmed on opinion of referee.

The Phoenix Mills, Appellant, v. James A. Miller and others, Respondents.—Judgment affirmed, with costs. Opinion by Learned, P. J.

Patrick Fox, Respondent, v. Robert Dixon, as Overseer, etc., Appellant.—Judgment and order reversed, new trial granted, costs to abide event. Opinion by Learned, P. J.

John Borley, Respondent, v. Wheeler & Wilson Manufacturing Co., Appellant.—Judgment affirmed, with costs. Opinion by Learned, P. J.

Benjamin F. Dingley, Appellant, v. The Star Knitting Company, Respondent.—Judgment affirmed, with costs. Opinion by Mayham, J.

Madeline Keenan and others, Respondents, v. Anne Keenan, Appellant.—Judgment affirmed, with costs, and with leave to defendant, in twenty days after notice of this judgment, upon payment of costs below, and of this ap-

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peal, to withdraw demurrer and answer over on opinion of court below.
Fred. H. Hill, Respondent, v. Lineas S. Belden, Appellant.—Order vacating, etc., reversed, with ten dollars costs and printing disbursements, and motion to vacate denied, with ten dollars costs.
James W. Tufts, Respondent, v. George E. Thorp, Appellant.—Order affirmed, with ten dollars costs and printing disbursements.
Fred. Scheidig, Appellant, v. Edward H. Bemis

and others, Respondents.—Judgment reversed, referee discharged, new trial granted, costs to abide event. Opinion by Learned, P. J.
Nancy Rexford, Appellant, v. George W. Hawn and others, Respondents.—Judgment reversed, new trial granted, referee discharged, costs to abide event.
Harmon N. Van Benschoten, Respondent, v. Rodney A. Gilbert, Appellant.—Judgment of County Court and of justice of the peace affirmed, with costs.

FOURTH DEPARTMENT, NOVEMBER TERM, 1890.

Maria Van Orman, Appellant, v. Jacob Van Orman, Respondent.—Decree of the surrogate of Tompkins county reversed and a new trial ordered before a jury in a Circuit Court of Tompkins county of the questions (1), whether the deceased, at the time of the execution of his will on June 13, 1881, possessed testamentary capacity; (2) whether the will then executed by the deceased was procured by undue influence; with the costs of the appeal allowed to the appellant, "payable out of the estate or fund." (Section 2589 of the Code of Criminal Procedure.) Opinion by Hardin, P. J.
Caroline B. Nichols, as Administratrix, Respondent, v. Josiah B. Morrow and others, Appellants.—Judgment affirmed, with costs. Opinion by Martin, J.
John Johnson, Appellant, v. Louisa C. Snell, as Executrix, and others, Respondents.—Judgment affirmed, with costs. Opinion by Merwin, J.
Deborah Taylor Lee and others, Plaintiffs, v. Charlemagne Tower, Jr., and others, Executors, and others, Defendants.—Judgment ordered in accordance with the opinion of Merwin, J., and to be settled by him upon five days notice. Opinion by Merwin, J.
William Beach, Respondent, v. The City of Elmira, Appellant.—Judgment affirmed, with costs. Opinion by Hardin, P. J.
The Phoenix National Bank, Respondent, v. A. B. Cleveland Company (Limited), and others, Appellants.—Interlocutory judgment affirmed, with costs, but with leave to the appellant, on payment of the costs of demurrer and the costs of this appeal, to withdraw their demurrer and answer within twenty days after a copy of a judgment of this court shall have been served affirming the judgment of the Special Term. Opinion by Martin, J.
The People of the State of New York, Respondent, v. Nicholas N. Betsinger, Appellant.—Conviction, orders and judgment reversed, and a new trial ordered in the Court of Sessions of Onondaga county, to which court the proceedings are remitted. Opinion by Hardin, P. J.
Jerome W. Staring, Respondent, v. The Western Union Telegraph Company, Appellant.—Judgment and order affirmed, with costs. Opinion by Martin J.; Hardin, P. J., not sitting.
Charles E. Whittaker as Administratrix, Appellant, v. The President, Managers and Company of the Delaware and Hudson Canal Company, Respondent.—Judgment and order reversed on the exceptions and a new trial ordered, with costs to abide the event. Opinion by Hardin, P. J.
The People of the State of New York, Respondent, v. Owen H. Loftus, Appellant.—Conviction, order and judgment reversed, and a new trial ordered in the Court of Sessions of Broome county, to which court the proceedings are remitted. Opinion by Hardin, P. J.
First National Bank of Carthage, Appellant, v. George E. Yost, Respondent.—Judgment affirmed, with costs. Opinion by Merwin, J.

First National Bank of Jersey City, Appellant, v. Orren G. Staples and another, Respondents.—Judgment affirmed, with costs. Opinion by Merwin, J.
Orren G. Staples, Respondent, v. Copely A. Nott, Appellant, Impleaded, etc.—Judgment affirmed, with costs. Opinion by Merwin, J.
In the Matter of the Judicial Settlement of Accounts of Ellen A. Clark, Surviving Executrix, etc.—Decree of the surrogate of Chenango county affirmed, without costs. Opinion by Hardin, P. J.
Cornelia P. Hotchkiss, Respondent, v. Augustus Martin and another, Appellants.—Judgment reversed and a new trial ordered before another referee, with costs to abide the event. Opinion by Martin, J.
Capital City Bank, Appellant, v. First National Bank of Syracuse and others, Respondents.—Judgment affirmed, with costs. Opinion by Merwin, J.
Charles D. Collins, Appellant, v. The Village of Little Falls, Respondent.—Motion denied, without costs.
Timothy Dasey, Plaintiff, v. William I. Skinner and others, Defendants.—Motion for leave to appeal to the Court of Appeals denied. Hardin, P. J., not sitting.
Thomas R. McQuade v. Lodema Scrafford.—Motion granted, with ten dollars costs, unless appellant within thirty days either serve his proposed case and exceptions, leave to do which is given, or the printed papers in case of his desire of being heard on the judgment-roll alone, and in case either is done, then this motion is denied without costs.
Isaac Matteson, Respondent, v. Edward Tracy, Appellant.—Order affirmed, with ten dollars costs and disbursements.
Ed. E. Buck, Respondent, v. Minnie A. Buck, Appellant.—Order affirmed, without costs.
Wilson H. Gardenier, Appellant, v. Oswego City Savings Bank and others, Respondents.—Order affirmed, with ten dollars costs and disbursements.
The Bagley & Sewall Company, Appellant, v. The Saranac River Pulp and Paper Company, Respondent.—Order affirmed, with ten dollars costs and disbursements.
Delora M. Hunter and another, Administrators, etc., Respondents, v. The Cooperstown and Susquehanna Valley Railroad Company, Appellant.—Judgment and order affirmed, with costs.
John Savelle, Appellant, v. George W. Wanfel and others, Respondents.—Order affirmed, with ten dollars costs and disbursements.
Dwight H. Murray, Respondent, v. Antonio Battina, Appellant.—Order affirmed, with ten dollars costs and disbursements.
Henry Hallenbeck, Appellant, v. Giles Hallenbeck and Lewis M. Smith, Respondents.—Order affirmed, with ten dollars costs and disbursements.
William O. Mills, Respondent, v. The New York Ontario and Western Railroad Company, Ap

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pellant.—Judgment and order affirmed, with costs.
 Luther G. Williams, Respondent, v. The New York, Ontario and Western Railroad Company, Appellant.—Judgment and order affirmed, with costs.
 Lewis H. Emerson, Respondent, v. The New York, Ontario and Western Railroad Company, Appellant.—Judgment and order affirmed, with costs.
 Louis Bernstein, Respondent, v. Sarah Goldman, Appellant.—Judgment of the County Court of Onondaga county affirmed, with costs.
 Mary T. Webb, Respondent, v. Gavin Morton, Appellant.—Judgment of the County Court of Onondaga county affirmed with costs.
 Margaret Murray, Respondent, v. John Blerhardt and another, Appellants.—Judgment of the County Court of Onondaga county affirmed, with costs.
 The People of the State of New York *ex rel.* Stalham W. Sherman v. Albert V. Seaton.—Judgment ordered for the plaintiff. *Held*, that there was no vacancy in the office of excise commissioner when the defendant claims his appointment was made.
 Wilson H. Gardenier, Appellant, v. Michael Taylor and others, as Officers and Trustees of Oswego Mutual Savings and Aid Association, Respondent.—Interlocutory judgment affirmed, with costs.
 The People of the State of New York *ex rel.* Agnes Moulton, Appellant, v. Frank Moulton, Respondent.—Order modified by striking therefrom that portion thereof allowing costs

and disbursements against the relator, and a provision inserted in said order to the effect that neither party shall have costs against the other, and as thus modified the order is affirmed, without costs of this appeal to either party.
 Sarah Briggs, Appellant, v. James B. Williams and another, Respondents.—Judgment reversed, without costs to either party, and a new trial ordered, with leave to plaintiff to bring in as parties the persons interested in the fund. Judgment to be settled before Mr. Justice Martin on five days' notice. *Held*, (1) that the judgment appealed from does not bind all parties interested in the fund; (2) that an adjudication as to the amount needed for the support of the plaintiff cannot be made until all the parties interested in said fund are brought before the court.
 In the Matter of the Estate of George C. Bronson, Deceased.
 Nancy Bronson, Appellant, v. Josiah Bronson and others, Respondents.—Decree of the surrogate of Oswego county reversed, with costs of the appellant payable out of the fund.
 George W. Venable and others, Appellants, v. Le Grand Hollon, Respondent.—Judgment of the County Court of Onondaga county affirmed, with costs.
 The Robert Graves Company, Respondent, v. Nathaniel Ayres, Appellant.—Order reversed, with ten dollars costs and disbursements, and motion granted.
 Charles A. Stone, as Overseer, etc., Respondent, v. Peter E. Launt, Appellant.—Order affirmed, with ten dollars costs and disbursements

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George W. Didsbury, Appellant, v. J. Wesley Van Tassel, Sheriff, etc., Respondent.—Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.; Dykman, J., not sitting.
 Amella Vredenburg, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.
 John Power, Executor, etc., Respondent, v. John Speckman, Appellant.—Judgment affirmed, with costs. Opinion by Barnard, P. J.
 The Mayor, etc., of the City of New York, Respondent, v. Mary Wright, Appellant.—Judgment affirmed, with costs. Opinion by Dykman, J.; Barnard, P. J., not sitting.
 Cyrus J. Marshols, Respondent, v. Mary E. Reynolds and another, Appellants.—Judgment affirmed, with costs. Opinion by Barnard, P. J.; Dykman, J., not sitting.
 Edward J. Curtin, Respondent, v. William H. Curtin, Appellant.—Judgment reversed and new trial granted, costs to abide event. Opinion by Barnard P. J.; Dykman, J., not sitting.
 Edward J. Curtin, Respondent, v. William H. Curtin and wife, Appellants.—Judgment affirmed, with costs. Opinion by Barnard, P. J.
 Mary Hoskins, Administratrix, v. James Stewart.—Motion denied.
 Frank H. Matthews, Plaintiff, v. Peter Gilleran, Defendant.—Order denying motion to vacate attachment affirmed, with costs and disbursements. Opinion by Dykman, J.; Pratt J., not sitting.
 Sarah M. Wilson, Respondent, v. Debby Ann McGregor, Appellant.—Order affirmed, with costs and disbursements. Opinion by Pratt J.; Barnard, P. J., not sitting.
 William Watson v. Albert Benz.—Motion for

reargument granted. Opinions by Barnard, P. J., and Dykman, J.
 The People of the State of New York, Respondent, v. Samuel Henschel, Appellant.—Conviction and judgment affirmed. Opinion by Barnard, P. J.
 The People of the State of New York, Respondent, v. William F. Sinell, Appellant.—Conviction and judgment affirmed. Opinion by Dykman, J.
 Matter of Judicial Settlement of Amos Denton's Estate.—Decree of surrogate modified by giving share to survivor and not to widow, costs to appellant out of estate. Opinion by Barnard P. J.; Dykman, J. dissenting.
 Henry T. Duryea, Respondent, v. William D. Andrews and another, Appellants.—Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J., Barnard, P. J., not sitting.
 Julia Roach v. The Long Island Railroad Company.—Appeal withdrawn.
 Charles Hardy, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order denying new trial affirmed, with costs. Opinion by Barnard, P. J.
 Cornelius E. Kene, Respondent, v. William R. Bergholz, Appellant.—Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.; Barnard, P. J., not sitting.
 John Powers v. George B. Valentine.—Judgment affirmed for non-submission of papers. Dykman, J., not sitting.
 Orlando Hand v. Abram S. Hewitt.—Judgment affirmed for non-submission of case under order, with costs.
 Alexander M. Hunter, Respondent, v. Clara L. Walter and others, Appellants.—Judgment affirmed, with costs. Opinion by Barnard, P. J.
 James B. Swain, Respondent, v. Samuel M. Pettengill, Appellant.—Order reversed, with costs and

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- disbursements, and motion granted, with costs. Opinion by Barnard, P. J., Pratt, J., not sitting.
- Robert E. Smith, Respondent, v. Theresa B. Collins and others, Appellants. — Judgment affirmed, with costs. Opinion by Barnard, P. J.
- Washington Bulkley, Appellant, v. Catharine Healy, Respondent. — Judgment affirmed, with costs. Opinion by Barnard, P. J.; Dykman, J., not sitting.
- Patrick J. Flannery v. Aslan Sattagan. — Order confirming award of arbitration, and order denying motion to vacate award affirmed, with costs and disbursements. Opinions by Barnard, P. J., and Pratt, J.; Dykman, J., not sitting.
- James H. Moran, Appellant, v. The Board of Trustees of the Village of White Plains, Respondent. — Judgment affirmed, with costs. Opinion by Pratt, J., Dykman, J., not sitting.
- Theodore McKuskie, Appellant, v. John Hendrickson, Respondent. — Order setting aside taxation reversed, with costs and disbursements, and motion denied, with costs. Opinion by Barnard, P. J.
- Joseph Woermann, Respondent, v. Berend Baas, Appellant. — Order denying motion to dismiss complaint affirmed, with costs and disbursements. Opinion by Barnard, P. J.
- Henry C. Martin v. Martha M. Huyler. — Motion granted for correction of judgment by striking out "appellant," and denied as to reargument. Opinions by Barnard, P. J., and Dykman, J.
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ASSOCIATION — Mutual accident association — recovery under a certificate thereof — necessity of evidence as to the amount which an assessment would produce.] 1. A certificate of membership in an accident association provided that the association would pay to the heirs of the assured "the principal sum, not exceeding four thousand dollars, realized upon an assessment, in accordance with the provisions of section one of article six of its by-laws as printed on the back of this certificate."

In an action brought to recover upon this certificate it appeared that the assured had died, and that the plaintiffs had demanded of the association that an assessment be made for the purpose of paying the loss resulting from the death of the assured, but that the defendant refused to make such assessment. There was no allegation in the complaint, nor evidence given on the trial, as to what amount would have been realized from such an assessment, if one had been made.

The court instructed the jury that if they found in favor of the plaintiffs they should find for the full amount of \$4,000.

Held, in the absence of evidence showing what amount would have resulted from the making of an assessment, in accordance with the by-laws of the association, that such instruction to the jury was error.

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2. — *Effect of misrepresentations in the application.]* The application for the insurance was, by the terms of the certificate, subject to the condition "that all the statements and representations contained in the Application for this Certificate are warranted to be correct and true in all respects, and if this Certificate * * * has been * * * obtained through misrepresentation * * * then the same shall be absolutely null and void."

This application for the certificate required an answer to the following question: "4th. Occupation? If more than one, name them all?" Which was answered, "Oil producer;" and also to the following question "State the duties required of you under that occupation." Which was answered "Supervising only." The undisputed evidence was to the effect that the insured had a small lease of oil lands, upon which he had two or more wells, which he managed and operated himself, doing every part of the work alone, which could be done by one man; that he attended his own boilers, ran his own engine, pumped his own wells, "pulled" his wells and made his own repairs without assistance, except upon extraordinary occasions.

Held, that the representation made by the assured was incorrect, and that the certificate was, for that reason, void. *Id.*

3. — *Relief fund of a mutual benefit association — when it goes to the heirs-at-law free from the claims of creditors of the deceased member.]* A certificate, issued by a society known as the Imperial Council of the Order of United Friends, provided that the party named therein was "entitled to all the rights and privileges of such membership, and a benefit of not exceeding one thousand dollars from the relief fund, which sum shall, at death, be paid to subject to will subject to the laws, rules and regulations of the order."

The articles of incorporation of the council provided for the establishment of "a relief fund from which a member of this association, who has complied with all its laws, rules and regulations, or a person or persons by such member lawfully designated, or the legal heir or heirs of such member, may receive a benefit in a sum not exceeding three thousand dollars;" and further provided, "Each applicant shall enter, upon his application, the name or names of the person or persons to whom he or she desires the benefit to be paid in case of death;" and, further, that in case of the death of all the beneficiaries selected by the member before the decease of such member, and no other disposition being made thereof, "the benefits shall be paid to the next of kin of the deceased member dependent upon him or her, and if no person or persons shall be entitled to receive such benefits by the laws of the order it shall revert to the relief fund."

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- Held*, that a creditor of the deceased member, who had taken out letters of administration upon his estate, could not maintain an action against the Imperial Council for the recovery of the money payable under such certificate. That, in default of a designation, either in his lifetime or by will, by the deceased member, the amount payable under such certificate went to his heirs-at-law. *BREECKEL v. ORDER OF UNITED FRIENDS*..... 7
- *Mandamus—to compel a mutual benefit association to make an assessment.*
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- *For insurance.*
See *INSURANCE.*
- *For mutual aid.*
See *INSURANCE.*

ATTACHMENT — Set aside — effect of a reversal of the judgment vacating it upon the rights of subsequent attaching creditors.] 1. A number of attachments having been issued in different actions, levies were made thereunder upon the same property. The earlier attachment was thereafter set aside on the motion of a subsequent attaching creditor, and the property was sold under the subsequent attachment, and the proceeds thereof were paid over by the sheriff to the parties obtaining such subsequent attachment.

Held, that the attachment so set aside could not be revived by the reversal of the judgment which vacated it, so that it would be reinstated as a lien upon the property, or upon the proceeds of the sale of the property attached.

That the subsequent attaching creditor, who had received the proceeds of sale of the property, could not be required to pay it over to the creditor whose prior attachment has been restored by the reversal on appeal of the judgment which vacated it. *HAEBLER v. MYERS*..... 179

2. — *Affidavit on an application for an attachment — must set forth facts showing that damages have been sustained.]* The affidavit upon which an application for an attachment is founded, where the damages are unliquidated, must set forth the facts which establish the damages, as the amount of damages must be shown in order to entitle the plaintiff to an attachment.

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3. — *Also the facts establishing the amount of damage.]* Such affidavit must also allege, not simply the conclusion that the plaintiff has suffered damage by reason of the breach of contract set forth to an amount specified, but must state the facts from which such conclusion may properly be drawn. *Id.*

— *A trustee and stockholder of an insolvent corporation cannot, as a creditor, attach its property.*

See *THROOP v. HATCH LITHOGRAPHIC CO.*..... 149

ATTORNEY AND CLIENT — Assignment by a client of his claim against his attorney — enforcement thereof by the assignee.

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— *Affidavit for the examination of a party before trial — when the plaintiff must make it himself.*

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BANKING — Mistake of a bank cashier in certifying negotiable paper as good — when the amount paid by the bank under such certification is recoverable by it.

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BANKRUPTCY — *Effect, as regards an accommodation maker of a note, of an acceptance of a dividend from the estate of the payee under the insolvency laws of another State by the creditor, a resident thereof.*

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— *Insolvent debtor's discharge — not vacated because the name of a creditor was misstated in the petition therefor.*

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BAR — *When a judgment is a bar.*

See JUDGMENT.

BENEVOLENT SOCIETIES:

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BILLS AND NOTES — *A party taking an accommodation note as collateral for a past-due check is not a bona fide holder for value.] 1. A bank receiving an accommodation note, which has been diverted from the purpose for which it was intrusted to the payee, as collateral security for a past-due check, does not acquire the right of a bona fide holder thereof for value.*

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2. — *It does not extend the time of payment of the check.] The taking of a note payable in the future, by a bank, as collateral security for a past-due check, does not extend the time of payment of the check, and thereby make the receiver of the note a bona fide holder thereof for value, in the absence of evidence of an agreement to extend such time of payment. Id.*

— *Mistake of a bank cashier in certifying negotiable paper as good — when the amount paid by the bank under such certification is recoverable by it.*

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— *Effect, as regards an accommodation maker of a note, of an acceptance of a dividend from the estate of the payee under the insolvency laws of another State by the creditor, a resident thereof.*

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BOARDS — *Of city officers.*

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BOARDS OF HEALTH:

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BOARD OF HOME MISSIONS — *The Board of Home Missions of the Presbyterian Church is not exempt from the collateral inheritance tax on legacies to it.*

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BONA FIDES — *Opening a judgment entered by default — what proof of good faith required.*

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BONA FIDE PURCHASER — *Of negotiable paper.*

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BOND — *Not naming the offense — not enforceable.] A bail bond which does not indicate the offense with which the principal is charged, and for which the bail undertakes that he will appear and answer, is void; nor can such*

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defect be supplied, by proof *aliunde* the bond, in an action not to reform, but to enforce, the undertaking of the surety after its alleged breach.

Where the surety does not undertake that the principal will appear to answer any particular charge, there can be no breach of the bond.

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— The possession of a bond and mortgage by the agent effecting the loan — confers no authority to receive the principal thereof before it becomes due.

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— When the sheriff's negligence or fraud discharges the obligation of a bond of indemnity.

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CANCELLATION — *Of a lis pendens.*

See PRACTICE.

CARRIERS — Common carrier — discrimination in its rates between different customers — a complaint, based upon a penal statute of another State, will not be sustained in the State of New York.] 1. In an action brought against a

common carrier by a shipper of merchandise, it was alleged in the complaint that the common carrier had allowed other shippers certain concessions and draw-backs upon the public rates or prices fixed by it for transportation of merchandise over its lines, which it had failed and refused to allow to the plaintiffs, and that by reason thereof the rates demanded and received by the defendant from the plaintiffs exceeded the rates charged to other parties for like services. It further alleged that these discriminations were made under, controlled by and were in violation of the act of the State of Pennsylvania, through which the defendant's line extended, declaring "that any undue or unreasonable discrimination by any railroad company or other common carrier * * * is hereby declared to be unlawful," and further providing "nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals or between individuals and transportation companies in the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered."

For a second cause of action the complaint alleged that the defendant furnished cars to other companies suitable for receiving their merchandise, whereas they required the plaintiffs, at their own expense, to furnish lumber for and do the work of fitting up the cars in a suitable condition to carry their merchandise, and thereby discriminated to the extent of one dollar for each car against the plaintiffs, and then repeated the allegations in reference to the statute of the State of Pennsylvania.

For the third cause of action the complaint alleged that the defendant discriminated against the plaintiffs, when its cars were insufficient to carry all the merchandise offered, in the apportionment of its cars between the plaintiffs and other shippers, to the plaintiffs' damage, and again repeated the reference to the statute of the State of Pennsylvania.

In each count the complaint claimed to recover, for damages, treble the amount of the injuries suffered by the plaintiffs in the premises.

Upon the hearing of a demurrer interposed to this complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, and of the absence of jurisdiction of the courts of the State of New York over the subject-matter of the action.

Held, that the object of the action being to bring the case within the statute of the State of Pennsylvania, and the remedy afforded by that statute being

CARRIERS — Continued.

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penal in its nature, that the action thereunder was not maintainable in the courts of the State of New York, as such courts would not enforce the penal laws of another State. *LANGDON v. N. Y., L. E. AND W. R. R. Co.*..... 122

2. — *Penal statute.*] That a statute enacted for the purpose of providing a punishment, as distinguished from one affording an indemnity, is penal in its nature. *Id.*

3. — *Common-law right.*] *Semble*, that while an action would lie at common law against a common carrier for withholding from a shipper of merchandise the equality of right which such shipper is entitled to enjoy with other patrons of the common carrier, yet a complaint which restricts the character of the action to a recovery under a particular statute of another State, which provides a penalty for such action on the part of the common carrier, will not justify a recovery of the damages to which the common carrier would be liable at common law for such discrimination between shippers upon its line. *Id.*

4. — *Common carrier — what constitutes a refusal to give accommodations to colored persons.*] In an action brought to recover the damages alleged to have resulted to the plaintiff from the refusal of the defendant, a common carrier, to furnish the plaintiff with accommodations on its steamboat, it appeared that the plaintiff, a colored minister, had applied to the defendant and obtained for himself and family berths upon the boat. Subsequently he applied to the purser to exchange the berths for state-rooms, and, at the suggestion of the purser, saw the captain, with whom he had some conversation, after which he was informed by the purser "no other arrangement will be made." The plaintiff thereafter stated to the purser that if he could get no state-room accommodations he would have to leave the boat and asked for his money, which was refunded to him. It appeared upon the trial that the purser had given state-rooms, after the application made by the plaintiff, to other parties.

Upon the trial the court charged the jury: "I am inclined to think that the plaintiff has made out a cause of action of about this width and extent," to which the defendant excepted and requested the court to charge that if the plaintiff voluntarily left the boat, then no cause of action accrued to the plaintiff, which request was refused.

Held, that the court erred in such refusal, as the evidence did not show that there was any demand for a state-room, except in exchange for the berths which the plaintiff had already secured, which exchange the defendant was not bound to make.

Semble, that the case should have been submitted to the jury upon the question whether the refusal to exchange the berths for state-rooms was made on account of the plaintiff and his family being colored persons, and whether, for that reason, they were refused the privileges extended to the white passengers. *MILLER v. NEW JERSEY STEAMBOAT Co.*..... 424

5. — *Express company — responsibility of, for a trunk left at its office after a receipt therefor is signed and the charges are paid.*] In an action brought against an express company to recover damages for the loss of the plaintiff's trunk, it appeared that the trunk reached the office of the company, at Watertown, on Saturday, and that the following Monday, in the forenoon, the plaintiff called at the office, stated that he wanted to take out some things that belonged to one Smith and then leave the trunk there until the following day or the next, to which the agent of the company replied that if the plaintiff paid the charges and signed the receipt book he could do so, and that it would be all right; whereupon the plaintiff paid the charges and signed the receipt book, took out the things, and then locked the trunk and left it at the office of the company. On the following Wednesday he went to the office and was informed by the agent that the trunk had been delivered to other parties the day before upon the assumption that the plaintiff had sent for it.

The court, upon the ground that there had been a complete delivery of the trunk to the plaintiff, and that the company ceased to be liable in any capacity therefor, and that the agreement with the agent that the trunk might remain did not bind the defendant, granted a nonsuit on the trial.

Held, that as the jury might have found that the agent of the company in making the arrangement for leaving the trunk was acting within the apparent scope of his authority, and that such arrangement was made before the

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payment of the charges and signing of the receipt, and as there had been no termination of the transaction with the company so far as the custody of what was left in the trunk was concerned, as that remained with it, as it had before, in the office of the company and under the control of its agent, that a proper case was presented for submission to the jury and that the nonsuit was erroneously granted. *ODERKIRK v. FARGO* 347

— *By land.*
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— *By water.*
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CASE — *On appeal.*
See APPEAL.

CAUSE — *Of an accident.*
See NEGLIGENCE.

CERTIORARI — *Return to a writ of certiorari — part of it cannot be stricken out by the court as irrelevant.]* 1 While the officers of a board, to which a writ of *certiorari* is directed, are required to return no more than a full account of the proceedings to be reviewed by means of the writ, no authority has been given to the court to strike out any part of the return because it may be irrelevant. *PEOPLE EX REL. HIGGINS v. GRANT*..... 158

2. — *If incomplete, a further return may be ordered.]* Where omissions exist in the return, so that a full and complete return of the proceeding has not been made, the power has been conferred upon the court to order the making of a further return. *Id.*

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CHARGE — *Removal of a clerk in the New York police department — no trial is necessary — notice to the clerk of the charge is required.*
See *PEOPLE EX REL. BRANT v. MACLEAN* 152

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See MUNICIPAL CORPORATIONS.

CITY STREETS:
See MUNICIPAL CORPORATIONS.

CIVIL SERVICE — *Removal of a clerk in the New York police department — no trial necessary — notice to the clerk of the charge is required.]* A clerk in the police department of the city of New York may be removed by the board of police commissioners, under section 48 of chapter 410 of the Laws of 1882, after he has been informed of the cause of the proposed removal, and has been allowed an opportunity for explanation. No trial is contemplated by the act, nor is the production of evidence to establish the charge. The knowledge of the existence of the cause of removal by the head of the department is sufficient.

The head of the department is the sole judge to determine the question whether the removal shall take place or not, but he can only act after hearing the explanation of the clerk whom it is proposed to remove.

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COMPTROLLER — *Duty of the comptroller of the city of New York to issue revenue bonds to pay the proportion of the State tax chargeable to that city — no deduction is proper of the tax on the amount added to the assessed valuation by the State Board of Equalization, nor of the amount raised in the State tax levy and not appropriated, nor of the amount of a deficiency in the city tax levy to meet such bonds.*

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CONSPIRACY — *What acts and statements of one conspirator are competent against the other — evidence — record of acquittal of one of two parties indicted for murder — admissibility of it on the separate trial of the other conspirator.*

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CONSTITUTIONAL LAW — *Conditions under which land is taken for a highway — cannot be done away with by the legislature to the prejudice of adjoining owners, without compensating them.] 1. By chapter 290 of 1867 the legislature authorized the towns of Morrisania and West Farms to widen, make and extend a highway in said towns, to be called the Southern Boulevard; and further provided that, "except for the purpose of crossing the same, no railway or tram-way shall be laid or constructed thereon, or upon any part thereof, by any persons or corporations whatsoever, without a special act of the legislature of this State for that purpose first had and obtained;" and further provided, that in case such special act should be passed the right should exist in the several owners of land which should be taken for the road, to claim and recover from the person or corporation obtaining authority to construct such railway the full value of all the land taken, to the same extent as if no such road had ever been laid out on said land. Subsequently, by chapter 723 of 1887, the legislature authorized a railroad to be constructed upon this boulevard.*

In proceedings taken by said railroad company to acquire the right to lay and operate its road upon the said boulevard, commissioners were appointed, who awarded only nominal damages to the owners.

Held, that the legislature, having authorized the taking of the land for public use, upon certain conditions, could not abolish those conditions and treat the property as though no such conditions had been attached to its condemnation when first taken.

That such conditions constituted a contract between the owners and the people, which the legislature had no right to abrogate.

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2. — *Authority given to railroad commissioners to dispense with the completion of a railroad*] Chapter 236 of 1889, amending chapter 430 of the Laws of 1874, authorizing the Board of Railroad Commissioners to certify that the public interests do not require that a railroad corporation should extend its railroad beyond that portion thereof actually constructed at the time that title to the road has been acquired by it, is not an assumption of judicial power upon the part of the legislature, nor is it unconstitutional as conferring judicial power upon the Board of Railroad Commissioners.

PEOPLE v. ULSTER AND DELAWARE R. R. Co. 266

3. — *Tax valid — although all the money is not appropriated.*] A law imposing a tax, which is otherwise invalid, is not impaired or rendered invalid under section 20 of article 8 of the Constitution of the State of New York by the fact that the appropriation bills, by reason of their reduction by the veto of certain items thereof by the governor, do not appropriate all the money which will probably be received under such tax.

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— *License to sell meat in a village — penalties for selling without a license, authorized by section 8, title 8 of chapter 291 of 1870, constitutional.*

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CONTEMPT — *A plaintiff avoiding service of an order — will not be heard on a motion to vacate it.*] It is the duty of the plaintiff in an action, to obey the orders of the court, made for the purpose of promoting the proceedings in the litigation, and where an order is obtained for the examination of the plaintiff as a witness before trial, and the plaintiff intentionally avoids placing himself where he may be personally served with the order, he will not be heard by the court on an application to vacate it.

In such case the plaintiff is not entitled to the assistance of the court, either by having it consider the grounds upon which the order has been made, or determine whether or not they are supported by the facts which the affidavits, upon which such order was obtained, establish.

DUDLEY v. PRESS PUBLISHING Co. 181

CONTRACT — *An agreement, terminable by ten days' notice, continues in force for ten days after such notice is given — default therein — waiver*]

1. Under an agreement, entered into by a manufacturer, owning a steel roll-

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ing-mill, with a vendor of steel, the latter agreed to furnish crude steel, and the former to manufacture it, at a fixed rate of compensation. The agreement was to continue during the mutual pleasure of the parties, and to terminate only after two months' notice. This agreement was afterwards terminated upon notice, at which time there was \$831.56 due to the plaintiff.

Thereafter the parties entered into an agreement which was to continue for five years, during which the vendor of steel was to have the exclusive sale of the entire product, with a credit of sixty days from the date of each monthly account within which to pay the amount thereof; and in case of his failure to make payment as provided for, it was stated therein that the agreement should, upon ten days' personal notice, be null and void.

This last-mentioned agreement was performed on both sides for about a year, at the end of which time it was claimed by the manufacturer that the vendor had made default in one of his payments, and a notice of ten days terminating the agreement was given by the manufacturer, who immediately stopped work.

In an action brought by the manufacturer to recover a balance due under each of these agreements, it was claimed by the defendant that the plaintiff could not recover the money sued for, because he had failed to perform the contract under which these moneys were earned, and that the breach of the contract had caused damage to the defendant.

Held, that, in view of the negotiations between the parties, which resulted in the making of the second agreement, any defaults which might have taken place under the first agreement were waived, and that a right of action existed against the defendant for the amount due under the first agreement at the time the second agreement was entered into.

That, under the second agreement, the manufacturer having at once stopped work, instead of waiting until the ten days fixed by the contract had expired, had broken the terms of this agreement.

That as it was necessary, in order that the plaintiff should recover the amount which he claimed under this contract, that he should show that he had performed it, no right of action existed in his favor and he could not recover for the work done prior to its breach. *JOHNSON v. TYNG* 501

2. — *Reservation of all claim for damages, accrued and to arise to the land conveyed, resulting from the operation of an elevated railroad — what owner is affected thereby.* One Lathrop, in conveying a piece of property in the city of New York on West Fifty-third street, in front of which an elevated railroad had been constructed, by an independent and unrecorded agreement reserved "all right, claim and demand heretofore accrued or arising, or which may hereafter arise or accrue to either of the parties to this agreement, against any and every corporations and corporation, person and persons, for or by reason of the erection and building and maintaining of the elevated railroad as at present constructed in Fifty-third street, in front of the premises above described," and the right "to sue for, collect, compromise, compound and receive to his own use, and release and discharge, any and every such claim and demand now existing and accrued, or hereafter to arise and accrue, against any corporation or corporations, person or persons, for such elevated railroad and the using and running of the same."

Held, that as the instrument in which this reservation was contained was unrecorded, a purchaser from Lathrop's grantees was not bound thereby.

Seemle, that this was not a reservation of an easement, but simply of the claims for damages which had been sustained by the grantor by reason of the continuous trespasses of the elevated railroad while he was owner of the property, and also of the claims which might thereafter accrue to his grantees for such damages as they should sustain by reason of like trespasses during their ownership.

That the instrument containing these reservations was a mere personal contract, binding only on the parties thereto, the grantor and grantees, and that a purchaser from such grantees was entitled to bring an action to restrain the railroad company from operating its railroad in front of the premises, because of a continuous invasion of the plaintiff's easement in the street, notwithstanding the fact that the railroad company had obtained from the grantor, Lathrop,

CONTRACT — Continued.

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a conveyance of his rights and such easements as were affected by the operation of its road.

That the easements in question being appurtenant to the land and incident to its use, Lathrop, the grantor, could not reserve to himself the right to restrain their invasion after he had ceased to own the property.

FOOTE v. MANHATTAN RY. Co. 478

8. — *Agreement by the president of a corporation to postpone the enforcement of his claim against it — not enforceable by a receiver.*] An agreement made by a creditor, the president and largest stockholder of a corporation, with a firm to which such corporation was also indebted, "in consideration of said firm's not pressing their claim to compulsory collection," that such president and stockholder would not enforce a claim existing in his favor for a balance of salary due him until after the other creditors of the corporation should have been fully paid, is not enforceable by a receiver, subsequently appointed, of the assets of such corporation, nor has the receiver a right in such a case to defer any payment to the president of the balance due him for salary until the claims of all other persons, creditors of such corporation, shall have been paid.

Such agreement on the part of the president of the corporation is not enforceable by the receiver thereof, as the representative of the company or of its stockholders, nor as the representative of the particular firm, the creditor of the corporation making such agreement with its president.

Semble, that such agreement must be enforced, if at all, by the creditor of the corporation with whom it has been made, and not by the receiver thereof for the benefit of such creditor.

SNOW v. RUSSELL COE FERTILIZER Co. 184

4. — *Consideration.*] In such a case the agreement is too vague and indefinite for enforcement, as the firm creditor does not bind itself to refrain from proceeding against the company for any given period of time, nor is the period of forbearance by the president for the enforcement of his salary stipulated, and there is, therefore, neither a valid consideration nor mutuality. *Id.*

5. — *Guaranty to pay all notes which should "prove to be uncollectible" — not enforceable until judgment and execution returned unsatisfied.*] One partner sold to another the stock in trade of the partnership and received himself from his copartner certain notes, accounts and demands owing to the firm, and also received a bond conditioned that his partner would pay to him one-half of all notes, accounts and claims of the late firm assigned to him "that shall prove to be uncollectible, if any such there be."

Held, that no right of action arose upon the bond as to any claim until the same had been prosecuted to judgment, and an execution had been issued upon such judgment and returned unsatisfied. RALPH v. ELDREDGE. 208

6. — *Actor agreeing to render exclusive service to one — when restrained by injunction from acting for another.*] A preliminary injunction to restrain an actor from breaking a contract, by which he has agreed to perform services exclusively for the plaintiff, will not be granted, except in cases where the artistic abilities of the defendant are exceptional, so that his place cannot readily be supplied.

It is only under such circumstances that irreparable damages can result to the plaintiff from a breach of the contract. CARTER v. FERGUSON. 560

— *Principal and agent — what disclosure required of an agent acting for both the parties to a bargain — commissions of an agent — account stated — when the minds of a principal and agent do not meet as to the latter's commissions.*

See FRANKEL v. WATHEN. 543

— *Master and servant — sub-contractor, of one contracting with a city to do the entire work — the city is not liable for his negligence — proof of damage resulting from loss of time.*

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— *Deed in which the grantee assumes payment of a mortgage on the premises conveyed — when the grantee (although his grantor was obligated to pay the mortgage) cannot be sued by the mortgagees.*

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- *Liability of the directors of a corporation for a failure to file an annual report — effect of the expiration of the existence of the corporation before the debt, under the terms of a contract made by it, become due.*
See GOLD v. CLYNE...... 419
- *Lease and contract for sale of coal to be mined — right of lessee to make use of any other product than the kind to be paid for under the contract.*
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- *General denial — in an action on contract proof may be given, under a general denial, that it was a wager contract.*
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- *Agreement to pay on the sale of a vessel and to give notice of the sale — when the statute of limitations begins to run.*
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- *Of general assignment.*
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- *Law of, relating to mortgages.*
See MORTGAGE.
- *Of suretyship.*
See PRINCIPAL AND SURETY.

CONTRIBUTORY NEGLIGENCE :*See NEGLIGENCE.***CONTROVERSIES — Compromise of.***See COMPROMISES.***CONVERSION — Of real into personal property.***See REAL PROPERTY.*

CORPORATIONS — Director of a corporation — liability of, in case of a failure to file an annual report — statute of limitations.] 1. In an action brought to charge a director of a corporation with a debt thereof, by reason of the failure of the directors to file an annual report of the condition of the corporation as required by law, it appeared that the plaintiff held a promissory note made by the Onondaga Coarse Salt Association, which, being about to wind up its business, deposited with the American Dairy Salt Company (Limited) the sum of \$10,880.90, and the plaintiff received from the latter company a pass-book in his name in account with said American Dairy Salt Company, containing the following credit: February 11, 1882, cash, \$10,880.90, and withdrew from such account, April 30, 1885, \$4,300; June 1, 1888, \$1,000, and July 11, 1888, \$1,000.

Held, that as there was no express, explicit agreement obligating the plaintiff to allow his money to remain on deposit with the American Dairy Salt Company, that the amount of money mentioned in the account became due from the corporation the moment it was deposited, and the defendant, as one of its directors, became liable to pay the same at that time, and that consequently the three years prescribed by the statute as the limitation of time applicable to the enforcement of such statutory penalty having elapsed, that the plaintiff's right to recover against the director was barred.

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That subsequent defaults in filing the annual report after the liability was complete did not aid the plaintiff. *CHAPMAN v. COMSTOCK* 825

2. — *Presumption that prohibited powers have not been exercised.*] That as the American Dairy Salt Company (Limited) was, by the thirteenth section of chapter 611 of 1875, expressly authorized to borrow money, and as it was not authorized to carry on a banking business, it was to be presumed that the corporation in receiving this money kept within its authorized powers and did not transgress the law by assuming to exercise banking powers, and that the transaction was, therefore, to be considered a loan rather than a deposit. *Id.*

3. — *A deposit made in violation of law becomes due immediately.*] That even if it should be assumed that a deposit had been made, and not a loan, such deposit being in violation of the law, the corporation became indebted for money had and received, and liable to an action therefor at the time that the deposit was made. *Id.*

4. — *Liability of the directors of a corporation for a failure to file an annual report — effect of the expiration of the existence of the corporation before the debt, under the terms of a contract made by it, became due.*] In an action brought to charge the directors of the Central Park Building Company (Limited), with an alleged liability of said company, because of a failure to file an annual report of its financial condition, it appeared that the company had been incorporated in 1883, under chapter 611 of 1875, to continue for two years from the date of filing its certificate, which was filed on June 6, 1883; that, on April 23, 1884, the corporation entered into a contract with the plaintiffs, by which the latter were to furnish and put up a steam-heating apparatus in the buildings of said company, and made all payments called for under the terms of the contract, up to and until the payment which was to be made on the final completion of the work, which was finished on the 7th day of December, 1885.

Held, that as the existence of the corporation ended in June, 1885, by the terms of its certificate, and as at that time no debt was due to the plaintiff from the corporation, that the defendants were not liable.

That the provisions of section 88 of chapter 611 of 1875, to the effect that "The dissolution, for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution," did not cover this case, as no liability had been incurred by the corporation for the amount sought to be recovered in this action until the contract had been fulfilled, before which time the corporation had ceased to exist.

GOLD v. CLYNE 419

5. — *Annual report of a corporation — what false statement as to the capital paid in, is not a material false statement, rendering the officers signing the report liable for its debts.*] In an action brought to charge one of the directors of the American Opera Company (Limited) with a debt existing against such company, upon the ground that the annual report filed by such company was false in its statements concerning the amount of capital stock which had been paid in, it appeared that one Henry Seligman, who was named in the report as one of the stockholders, was not, and never had been, the owner of stock in the corporation; that a certificate for ten shares of stock, amounting to the sum of \$1,000, had been sent to him, which he had refused to accept and had returned, and that this amount, as well as an additional sum of \$1,000, for which there was no foundation whatever, was included in the amount of the capital stock of the company stated in the report to have been paid in.

Held, in view of the fact that the jury might have found that \$146,600 of the capital stock of the company had been paid in, that this error, to the extent only of \$2,000, did not make the report "false in any material representation."

That this slight discrepancy could have had no effect whatever upon the connection or dealing of its creditors with the corporation, and that, therefore, the statement could not be a material false statement, rendering the officers who signed the report liable for the debt of the company. *WALTON v. GODWIN*, 87

6. — *Covered by the words "person or persons" in the lien law, section 1824, chapter 410 of 1882.*] A corporation may file a notice of lien, under section

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1824 of chapter 410 of the Laws of 1882, although such statute provides that such lien may be filed by "any person or persons," as a corporation, is as completely within the intention of the section as a natural person would be, and is equally entitled to its protection.

When persons are mentioned in a statute corporations are included, if they fall within the general reason and design of the statute. *GASKELL v. BEARD*, 101

7. — *Error in the amount stated in the notice of lien to be due.*] Although the statute (Laws of 1882, § 1825, chap. 410) provides that the notice shall state the amount claimed, from whom it is due, or to become due, "giving the amount of the demand after deducting all just credits and offsets," etc., yet where, without any fraudulent intent, and through mistakes on the part of the persons having in charge the details of the business, the amount claimed in the notice of lien is considerably greater than the amount shown by the evidence to be due, the lien will be enforced, notwithstanding such error in the amount claimed in the notice. *Id.*

8. — *A trustee and stockholder of an insolvent corporation cannot, as a creditor, attach its property*] A trustee and stockholder of a corporation which has become insolvent cannot, as a creditor thereof, commence an action against such corporation and obtain an attachment against its property upon the ground that the corporation has unlawfully assigned and disposed of its property with intent to defraud its creditors.

A trustee of a corporation is disabled, by the provision of the statute, from, in such manner, securing a preference over other creditors thereof in the payment of his debt.

The fact that such trustee has not been an active trustee in the management of the affairs of the corporation, and has had no influence with the other trustees, and that he has urged his co-trustees to take steps to put the company in the hands of a receiver, and that his co-trustees have conspired together to defraud him and the other creditors of the company, does not change his rights or position or remove his disability in the premises.

THROOP v. HATCH LITHOGRAPHIC CO...... 149

— *A corporation organized under chapter 425 of 1855 and chapter 394 of 1867 — power of to mortgage its property to a director — enforcement of a mortgage foreclosure judgment against property in the hands of a receiver.*

See PRESTON v. LOUGHRAN...... 210

— *Order that an answer be made more definite and certain — granted where the complaint alleges, generally, false representations to have been made by agents of a corporate plaintiff.*

See TEXAS, ETC., OIL CO. v. MUT. FIRE INS. CO...... 560

— *Express company — responsibility of, for a trunk left at its office after a receipt therefor is signed and the charges are paid.*

See ODERKIRK v. FARGO...... 347

— *Eminent domain — what must be shown by a tram-way company seeking to acquire land — what is not a public use.*

See MATTER OF SPLIT ROCK CABLE CO...... 351

— *Denial of knowledge as to incorporation.*

See VULCAN v. MYERS...... 161

— *Societies, clubs and similar bodies.*

See ASSOCIATIONS.

— *To carry on insurance business.*

See INSURANCE.

See MUNICIPAL CORPORATIONS.

RAILROAD.

COSTS — *Assignment of judgment — liability of the assignee for costs, where the judgment is reversed on appeal.*] 1. Where a judgment, recovered before the trial court, is assigned, together with "all sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon," and such judgment is reversed on an appeal, the assignee of the judgment is liable for the costs recovered by the defendant by reason of the fail-

COSTS—*Continued.*

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ure of the plaintiff's cause of action, and an order is properly made by the court directing the payment of such costs by such assignee. **TUCKER v. GILMAN**.. 167

2. — *It extends to all costs of the action.*] The liability is not limited to the costs accruing after the assignment, but extends to all the costs of the action. *Id.*

3. — *To what case the rule is applicable.*] This rule is applicable to an action brought by the assignee of the receiver of a manufacturing company, incorporated under the laws of the State of New York, to recover the balance of sixty per cent of the defendant's unpaid subscription for the stock of such company, where the plaintiff fails to recover judgment by reason of the complaint setting forth a claim for the recovery of the amount unpaid and owing by the defendant on the shares of stock of the corporation subscribed for, instead of a cause of action for the ascertainment and adjustment of the amount which is properly payable by such stockholder in order to satisfy the debts of the company. *Id.*

4. — *In what case it is not applicable.*] It is only when the judgment attempted to be assigned has been recovered upon a cause of action, not itself assignable or transferable, that the attempted assignment will not operate to charge the assignee with the costs of the action where such judgment shall be subsequently reversed on appeal. *Id.*

5. — *From what the liability results.*] The liability cannot be avoided by the omission of the assignee to take active charge of the prosecution of the action, as it results from the assignment itself, by which the assignee becomes entitled to the advantages of the litigation in case of its success. *Id.*

6. — *Against an assignee of the cause of action.*] Section 3247 of the Code of Civil Procedure, in relation to the payment of costs, only applies to a case where the cause of action has been transferred to the party sought to be charged with costs, or he has become beneficially interested therein.

METROPOLITAN CONCERT CO. v. SPERRY..... 470

7. — *Sureties upon an undertaking, who prosecute the action brought by their principal, are not liable for the costs—remedy of the defendant.*] That section does not cover a case in which a surety upon an undertaking, given upon obtaining an order of arrest, applies to the court to set aside a default made by the plaintiff in that action, and to be permitted to prosecute, and does prosecute, the same. *Id.*

8. — *Remedy.*] The remedy of the defendant, in the action in which the order of arrest was obtained, must rest upon the undertaking given by the sureties. *Id.*

9. — *Additional allowance to several defendants—how apportioned where the judgment is reversed on appeal as to some of such defendants.*] On the trial of an action brought against nine defendants, who had interposed demurrers to the plaintiff's complaint, judgment was rendered in favor of the defendants, and separate bills of costs were awarded to some of the defendants, and \$750 was awarded to all of the defendants as an additional allowance. This judgment was affirmed at General Term, and separate bills of cost were taxed by the same defendants.

On appeal to the Court of Appeals that court reversed the judgment as to all of the defendants except two, as to whom it was affirmed, without costs.

Held, that the two defendants, in whose favor judgment of affirmance was rendered by the Court of Appeals, were entitled to full bills of costs at the General and Special Terms, but, if to any part thereof, only to their proportionate share of the additional allowance of \$750, namely, two-ninths thereof.

METROPOLITAN EL. RY. CO. v. DUGGIN..... 156

10. — *On the reference of a disputed claim against an estate.*] The proceedings in the case of a disputed claim against an estate, which is referred under the provisions of the Revised Statutes, are controlled by the Revised Statutes, as regards the allowance of costs therein, and not by the Code of Civil Procedure.

Under the Revised Statutes the costs are represented by the disbursements, and do not necessarily include the allowances provided for in the fee bill in actions. **MATTER OF McQUEEN**..... 173

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11. — *Payable as a condition of granting a new trial, where a verdict is set aside as against evidence.*] A party entitled to relief against a verdict not supported by the evidence, is properly required, as a condition of his obtaining a new trial, to pay the costs of opposing the motion and the costs of the trial, including witness fees and disbursements, but not to pay all the costs of the action, as a condition of the granting of a new trial. *BUCK v. WEBB*..... 185

— *Additional allowance — tax on franchise not a basis therefor.*

See PEOPLE v. ULSTER AND DELAWARE R. R. Co...... 206

COUNSEL — Policeman — when tried, entitled to counsel.

See PEOPLE EX REL. VAN HISE v. POLICE COMRS...... 224

COUNTER-CLAIM :

See SET-OFF.

COUNTY — Supervisor — right to compromise an action although the judgment therein is chargeable to the town.]

1. An action having been brought against the supervisor of a town to recover for professional services rendered by the plaintiff, as an attorney and counselor-at-law, to the predecessor of such supervisor, judgment was entered in favor of the plaintiff for \$804.30, and was appealed from by the supervisor, after which negotiations were carried on between the plaintiff and the supervisor, resulting in a stipulation, whereby it was agreed by the plaintiff that upon the payment of \$400 and the costs, as entered in the judgment, with interest, and upon consideration that no appeal should be taken from such judgment by the defendant, the judgment should be satisfied and the action be discontinued, provided such payment should be made before the 15th day of February, 1891. The supervisor thereupon withdrew the notice of appeal from the judgment, which had been theretofore served, and leave was obtained from the Special Term to withdraw such notice of appeal, and on application to the General Term such appeal was dismissed, prior to which, however, a town meeting had been held, at which a resolution was passed directing the supervisor to appeal from the judgment.

Held, that, as there was no evidence that the compromise was not honestly made, the supervisor was not bound by the action of the town board, although by the provision of the statute, the amount of the judgment was payable by the town after its audit by the town board.

That, in the absence of fraud, the supervisor had the power to settle the matter in dispute. *HULBURT v. DEFENDORF* 585

2. — *Right of the town to order an appeal to be taken.*] That although in certain actions, which may be maintained by parties against the town in its municipal name, it is made, by statute, the duty of the supervisor of the town to place before the electors of the town a full statement of such suit or proceeding for their direction in regard to the defense thereof, the statute has no application, nor is the supervisor bound to accept the instructions of the town board, in an action brought against him in his individual name. *Id.*

3. — *Supervisors — authority of, to appoint commissioners to lay out a highway.*] Since the passage of chapter 773 of the Laws of 1873 a board of supervisors has no authority to appoint commissioners to lay out a highway, except upon the certificate of the commissioners of highways.

PEOPLE EX REL. SAMMIS v. SUPERVISORS..... 371

COURTS — Supplementary proceedings — the order for the examination of the debtor must be made returnable before one of the officers mentioned in section 2434 of the Code of Civil Procedure.

See PECK v. BALDWIN..... 308

— *Action for an account of the management and sales of land in another State — when it is not necessary to allege that the defendant has money belonging to the plaintiff — jurisdiction of the courts of the State of New York.*

See READING v. HAGGIN..... 450

— *Board of Railroad Commissioners — power of, to give a certificate dispensing with the further extension of a railroad — an action by the people to*

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annul the corporation does not preclude its so doing—its reasons for so doing not reviewable by the courts.

See PEOPLE v. ULSTER AND DELAWARE R. R. Co. 266

— *Flagman at railroad crossing—constitutionality of an order of court requiring it under chapter 439 of 1884.*

PEOPLE v. LONG ISLAND R. R. Co. 412

— *The pension of a Supreme Court justice on his reaching the age of seventy years is not conditional on his having served ten years of the abridged term.*

See PEOPLE EX REL. GILBERT v. WEMPLE. 275

— *Of surrogate.*

See SURROGATES.

COVENANTS — *Landlord and tenant — a covenant to pay rent, and a covenant to pay at the expiration of the lease one-half of the appraised value of buildings erected by the tenant, when dependent covenants.*

See BATES v. JOHNSTON. 528

COVERTURE:

See HUSBAND AND WIFE.

CREDITOR:

See DEBTOR AND CREDITOR.

CREDITOR'S SUIT — *To set aside fraudulent conveyances.*

See FRAUDULENT CONVEYANCE.

CRIMES — *Appeal from an order denying a motion for a new trial, unnecessary in a criminal action.]* 1. In a criminal action it is not necessary to state in the notice of appeal that it is taken from the order denying the defendant's motion for a new trial, as sections 485 and 517 of the Code of Criminal Procedure provide that, upon an appeal from a judgment, the decision of the court on a motion for a new trial may be reviewed. PEOPLE v. SCHAD. 571

2. — *Misconduct on the part of the jury requiring that a new trial be granted.]* After the jury had retired to deliberate on their verdict in a criminal case, the officer having them in charge, without leave of the court, took them to dinner at a hotel, and before dinner one of the jurors separated himself from his fellows and entered the public bar-room where he called for and drank brandy at the bar; and on the same occasion another juror, after dinner, went alone to the water-closet in the basement of the hotel, and followed, but did not overtake, until they arrived at the court-house, the other jurors, who had preceded him on their return.

Afterwards, when, by leave of the court, the jury, not having agreed upon the verdict, were taken to the hotel for supper, the juror who had taken brandy before dinner went alone to the bar-room and drank there again.

Held, that this constituted misconduct on the part of the jury which vitiated the verdict, and because of which a new trial should be granted. *Id.*

3. — *What is not an omission to perform his duty by a public officer, within the meaning of section 154 of the Penal Code.]* One Ryall, the superintendent of public works of Saratoga Springs, was indicted for having willfully omitted to make oath and execute an affidavit that he had not been interested peculiarly in any contract, work, materials or other matter connected with his official duties, as prescribed by chapter 257 of the Laws of 1874, before receiving a portion of his salary or compensation provided for by section 5 of that act.

The indictment was found under section 154 of the Penal Code, which provides that "where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor."

Held, that chapter 257 of the Laws of 1874 required the making of the oath, not in the defendant's official, but in his personal, capacity, and that the omission to make the oath was his individual, and not his official, omission.

CRIMES — Continued.

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That the law did not require the defendant to make the oath, but left it optional with him, suspending his right to receive a salary until he should do so.

That the wrong done by the defendant consisted not in the omission to take the oath, but in his receiving his salary before his right to receive it was complete. *PEOPLE v. RYALL*..... 235

4. — *Action for penalties under the law to protect fish — the authority of the proper officer must appear.*] An action to recover penalties imposed for violating the laws for the protection of fish (§§ 23, 24, chap. 534 of 1879; chap. 127 of 1884 and chap. 11 of 1886), cannot be brought in the name of the people unless it appears that such action was brought by authority of the proper officer.

It cannot be presumed that any officer authorizes an action in which his name does not appear, and in which his authority to bring it is not claimed.

Such an action is a penal action, and the statutes authorizing it must be construed and pursued strictly.

The people have no capacity to sue for penalties, except as authorized by law, and not then except through the officer or person authorized to bring the suit. *PEOPLE v. BELKNAP*..... 241

5. — *What acts and statements of one conspirator are competent against the other — evidence.*] Although, during the continuance of a conspiracy, the acts and declarations of either conspirator in furtherance of the conspiracy are competent evidence against the other, the declarations of either before the formation of the conspiracy or after the consummation of the offense are not admissible. *PEOPLE v. KIEF*..... 337

6. — *Record of acquittal of one of two parties indicted for murder — admissibility of it on the separate trial of the other conspirator.*] On the trial of an issue in a criminal action, as to whether the accused aided and abetted another in the commission of the crime, a judgment of acquittal rendered upon the trial of that other person for such crime is properly rejected. *Id.*

— *Discussing before the jury the defendant's failure to go upon the stand in a criminal case — is ground for a new trial — felonious intent in grand larceny — evidence as to.*

See *PEOPLE v. DOYLE*..... 535

— *Evidence — unsworn statement of a child — quarrelsome character of a complainant against one indicted for an assault.*

See *PEOPLE v. FRINDEL*. 482

— *Evidence — trial for petit larceny — proof of similar transactions having taken place elsewhere.*

See *PEOPLE v. WILLIAMS*..... 284

— *Indictment for.*

See *INDICTMENT*.

CUSTODY — Of children.

See *INFANT*.

DAMAGES — Railroad company — right of, to run trains on any of its tracks, although the track used is immediately adjoining a dwelling-house, and its use is peculiarly prejudicial thereto.

See *FLINN v. N. Y. C. AND H. R. R. R. Co.*..... 230

— *Master and servant — sub-contractor, of one contracting with a city to do the entire work — the city is not liable for his negligence — proof of damage resulting from loss of time.*

See *WOOD v. CITY OF WATERTOWN*..... 298

— *Executors and trustees may recover the damage caused to property by an elevated railroad, as well that caused before as that arising after their testator's death.*

See *KNOX v. METROPOLITAN EL. RY. Co.*..... 517

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— *Affidavit on an application for an attachment — must set forth facts showing that damages have been sustained, and the facts establishing their amount.*

See WESTERVELT v. AGRUMARIA, ETC. 147

— *Public officer — acting under an unconstitutional statute — liability of, to an individual damaged.*

See WATERLOO WOOLEN MFG. CO. v. SHANAHAN. 50

— *Effect of payment of money to the father of an injured minor and the execution of a release by the minor.*

See PALMER v. CONANT. 333

— *Evidence as to the defendant's wealth and family, in an action for slander.*

See ENOS v. ENOS. 45

— *From blasting — negligence need not be shown.*

See BENNER v. ATLANTIC DREDGING CO. 359

DEBT — *Within the meaning of section 12, chapter 40 of 1848.*

See CORPORATIONS.

DEBTOR AND CREDITOR — *Effect, as regards an accommodation maker of a note, of an acceptance of a dividend from the estate of the payee under the insolvency laws of another State by the creditor, a resident thereof.]* 1. In an action brought against an accommodation maker of a note by a national banking association, located at Springfield, in the State of Massachusetts, the defendant, who resided in the State of New York, proved that the Hurlbut Paper Company, the payee of the note, for whose accommodation the note was made, was adjudged to be insolvent, under the laws of the State of Massachusetts, in proceedings duly had there; that the plaintiff proved its debt under the insolvency proceedings, which resulted in the release and discharge of the debtors, upon their paying twenty per cent of their indebtedness, which percentage was received by the plaintiff upon the note.

Held, that the discharge of the Hurlbut Paper Company under the Massachusetts insolvent laws, and the acceptance of a dividend by the plaintiff, did not furnish a defense to the defendant.

That, under the circumstances of this case, the appearance of the plaintiff, the creditor, in the insolvency proceedings, and the acceptance of the dividend, in no way deprived the accommodation maker of the note of any rights which he could have insisted upon, as against the debtor, had there not been such an appearance and acceptance of the dividend.

Sembla, that the rule is otherwise where the debtor and creditor do not reside in the same State.

Quære, whether the courts of the State of New York, as against a resident thereof, would give effect to a provision of the insolvent laws of the State of Massachusetts, providing that a discharge thereunder should not release or discharge a person liable for the same debt as partner, joint-contractor, indorser, surety or otherwise. THIRD NAT. BK. v. HASTINGS. 531

2. — *Supplementary proceedings — the order for the examination of the debtor must be made returnable before one of the officers mentioned in section 2434 of the Code of Civil Procedure.]* In supplementary proceedings, instituted before a justice of the Supreme Court upon a judgment recovered in that court, where the execution has been issued out of the Supreme Court, the order for the examination of the judgment-debtor must be made returnable before a justice of the Supreme Court residing in the judicial district embracing the county to which the execution has been issued, or before the county judge, or a special county judge, or special surrogate of that county, or of an adjoining county.

The provisions of section 2434 of the Code of Civil Procedure, in this respect, are applicable to a proceeding instituted before a justice of the Supreme Court, where the execution has been issued out of that court, and are not confined in their operation to proceedings instituted before such a justice where an execution has been issued out of another court.

PECK v. BALDWIN. 308

3. — *Insolvent debtor's discharge — not vacated because the name of a creditor was misstated in the petition therefor.]* The fact that, in a list of

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creditors contained in the petition for an insolvent's discharge, the name of Thomas Wheeler appeared, whereas properly the name of Obed Wheeler, as administrator of Thomas Wheeler, should have been entered, where there is no evidence that the petitioner was aware of the death of Thomas Wheeler, which had recently happened, does not oblige the court to set aside the order of discharge.

It is not every omission or error in proceedings for the discharge of an insolvent which will render them void. If the proceedings are honestly prosecuted, the inclination and duty of the court will be to disregard errors that will not cause injury. *WHEELER v. EMMELUTH* 869

— *Chattel mortgage — sale of the chattels in bulk, and at a place where they were not in view of the purchasers — such a purchase by the mortgagee does not extinguish the equity of the mortgagor — effect of the mortgagee retaining possession without a sale.*

See *SHERMAN v. SLAYBACK* 255

— *Liability of the directors of a corporation for a failure to file an annual report — effect of the expiration of the existence of the corporation before the debt, under the terms of a contract made by it, became due.*

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— *Deed in which the grantee assumes payment of a mortgage on the premises conveyed — when the grantee (although his grantor was obligated to pay the mortgage) cannot be sued by the mortgagee.*

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— *A party taking an accommodation note as collateral for a past-due check is not a bona fide holder for value — it does not extend the time of payment of the check.*

See *STATE OF N. Y. NAT. BANK v. COYKENDALL* 205

— *Annual report of a corporation — what false statement as to the capital paid in, is not a material false statement, rendering the officers signing the report liable for its debts.*

See *WALTON v. GODWIN* 87

— *An administrator who negotiates a sale of the real estate of his intestate, conveyed by the deed of the heirs, is liable for the money received by him therefor and deposited in a bank which fails.*

See *HARLOW v. MILLS* 391

— *Trust for the benefit of the grantor and others — invalid as against the creditors of the grantor to the extent of his interest only,*

See *SLOAN v. BIRDSALL* 317

— *Agreement by the president of a corporation to postpone the enforcement of his claim against it — not enforceable by a receiver — consideration.*

See *SNOW v. RUSSEL COE FERTILIZER CO.* 184

— *Proceeds of a note sent to a bank for collection — when recoverable from the receiver of the bank.*

See *FRANK v. BINGHAM* 580

— *Acknowledgment of an indebtedness — to avoid the statute of limitations it must be one intended to be communicated to the creditor.*

See *SMITH v. CAMP* 434

— *The possession of a bond and mortgage by the agent effecting the loan — confers no authority to receive the principal thereof before it becomes due.*

See *SCHERMERHORN v. FARLEY* 66

— *Relief fund of a mutual benefit association — when it goes to the heirs-at-law free from the claims of creditors of the deceased member.*

See *BEECKEL v. ORDER OF UNITED FRIENDS* 7

— *Proposals for a settlement — admission of a fact — offer to settle — proof of settlement made with another person*

See *SLINGERLAND v. NORTON* 578

— *Interest on a bond and mortgage — at what rate chargeable — voluntary payment.*

See *WILCOX v. VAN VOORHIS* 575

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- *Assignment by debtor.*
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DECLARATIONS — When competent as evidence.
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DEEDS — *Delivery of trust deeds — presumed from their acceptance by the trustee and recorded, though afterwards found in the grantor's possession — when not void as made in contemplation of marriage — effect of subsequent representations and possession of the property by the grantor.*

See BLISS v. WEST..... 71

— *Foreclosure of a purchase-money mortgage — answer setting up a breach of a covenant of seizin in the deed given by the mortgagee.*

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DEFAULT — Judgment by.
See JUDGMENTS.**DELIVERY — To and by a common carrier.**
See CARRIERS.

- *Of a deed.*
See DEEDS.

DENIAL :
See PLEADINGS.**DEPENDENT COVENANTS .**
See COVENANTS.

DEPOSITION — *Examination of a party before trial, to enable the plaintiff to amend his complaint — it will not be ordered unless the party be first applied to, to furnish the information voluntarily.]* 1. By an affidavit, made in proceedings to obtain the examination of one Addicks in order to enable the plaintiff to obtain facts necessary for use in the preparation of his complaint, it appeared that the action was brought to enforce an agreement alleged to have been made by the defendant to pay the plaintiff, as compensation for his services, a percentage of ten per cent upon the profits of certain contracts made by the defendant; that judgment was sought for the payment of such amount; that no complaint had been served, that the agreement was not denied by the defendant; that the said Addicks was chairman of the defendant and familiar with all its transactions; that he resided in the city of Boston, but came from time to time to New York city on business of the company, which had at the time, or until recently, an office in said city; that the testimony of said Addicks was material and necessary to enable plaintiff to prepare his complaint, as he had no knowledge as to what contracts embraced within said agreement had been closed, and what the profits thereof were, etc.

It was objected, that the affidavit did not show that the plaintiff had ever made any application at the office of the company, or to any person connected with it, for the desired information.

Held, that the objection was well taken.

That no person should be subjected to a compulsory examination on an application of this kind, unless it appeared that an application had been made to the company for the information desired, followed by a refusal to give it, or that an imperfect response had been made to the application.

That while parties might not be bound to go out of the State for the purpose of applying for such information, yet as it appeared in this case that Addicks occasionally came to the city of New York on business, and as such information might be obtained by a letter properly addressed to the company, the order for the examination of Addicks should not be granted until such efforts to obtain the information had been made.

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2. — *Examination of a party before trial — when proper to enable plaintiff to frame his complaint.*] In an action brought to recover the amount due upon a promissory note made by the defendant, payable to his own order and indorsed by him, an application was made by the defendant for an order authorizing an examination of the plaintiff in order to enable the defendant to obtain information necessary for use in the framing of his answer. The information desired by the defendant related to the transfer of the note to the plaintiff, in regard to which the defendant's affidavit stated that he was not only ignorant, but that the knowledge of such facts could only be obtained from the plaintiff, and that such knowledge was necessary to enable the defendant to frame and serve his answer.

An order was made directing the examination to include answers to such questions as should be put to the plaintiff touching the alleged transfer of the note to him, the date of the transfer, the parties to it, the consideration thereof, and such other matters as might be relevant or material thereto. It was restricted to the facts known to the plaintiff, and necessary for the information of the defendant in answering the complaint.

Held, that the order was properly made.

That it was not an answer to the application, that the defendant might examine the plaintiff as a witness upon the trial, for such examination would be restricted to the issue made by the pleadings, while the application in question was for an examination necessary to enable the defendant to make the issues as broad as the facts would warrant. *HAYNES v. CREIGHTON* 140

3. — *Affidavit for the examination of a party before trial — when the plaintiff must make it himself.*] The affidavit upon which an application is made for the examination of parties defendant before trial should be verified by the plaintiff, as the plaintiff is the only person who can state, as to his own knowledge or intention, in the material allegations thereof.

The affidavit, if verified by the attorney for the plaintiff without any sufficient reason being given therefor, will not justify the granting of an order for such examination.

It is not a sufficient reason that the plaintiff is not within the county in which his attorney resides. *SIMMONS v. HAZARD* 119

— *A plaintiff avoiding service of an order — will not be heard on a motion to vacate it.*

See DUDLEY v. PRESS PUBLISHING CO. 181

DIRECTORS — Of corporations.

See CORPORATIONS.

DISCHARGE — *Removal of a clerk in the New York police department — no trial necessary — notice to the clerk of the charge is required.*

See PEOPLE EX REL. BRANT v. MACLEAN 152

— *In bankruptcy.*

See BANKRUPTCY.

DISCOVERY — Examination of a party before trial.

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DISPOSSESSION — Of tenant.

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DISSOLUTION — Of corporations.

See CORPORATIONS.

EASEMENTS — *Reservation of all claims for damages, accrued and to arise to the land conveyed, resulting from the operation of an elevated railroad — what owner is affected thereby.*

See FOOTE v. MANHATTAN RY. CO. 478

ELEVATORS — *Accident resulting from want of a safety clutch — negligence.*

See MASTER AND SERVANT.

EMINENT DOMAIN — *What must be shown by a tram-way company seeking to acquire land — what is not a public use.*] In proceedings to condemn

EMINENT DOMAIN — Continued.

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land under the right of eminent domain for the purposes of the road-way of an elevated tram-way company, incorporated under chapter 462 of the Laws of 1888, it is incumbent on the petitioner to show, first, a legislative warrant for such proceedings on its part; and, second, if the right is challenged, that the business which it is organized to carry on is public, and that the taking of private property for the purposes of the corporation is a taking for public use.

The true criterion by which to judge of the character of the use is to determine whether the public may enjoy it by right or only by permission:

Where an elevated tram-way consists of two elevated cables about ten feet apart, on which boxes are run by means of a trolley or pulley, one line taking the boxes that have been filled, and the other line taking back the boxes that are empty, and there is no access at one end of the tram-way, except over a private road, so that the public cannot make use of it at that end, except at the will of the owner of such private road, and where the service of the tram-way is intended to subserve the interests of one particular company, and the general public have no opportunity to use it, except as there may be a surplus capacity after supplying the uncertain and increasing wants of such company, the tram-way company is not in the position of a common carrier, and land sought to be taken for its purposes cannot be deemed to be taken for public use. **MATTER OF SPLIT ROCK CABLE CO.**..... 351

— *Easement taken by an elevated railroad — value thereof not conclusively determined by a judgment granting an injunction, to become inoperative upon the payment of a specified sum.*

See **MATTER OF METROPOLITAN EL. RY. CO.**..... 563

— *Conditions under which land is taken for a highway — cannot be done away with by the legislature to the prejudice of adjoining owners, without compensating them.*

See **MATTER OF SOUTHERN BOULEVARD R. R. CO.**..... 497

EMPLOYER AND EMPLOYEE:

See **MASTER AND SERVANT.**

EQUITY — *Mistake of a bank cashier in certifying negotiable paper as good — when the amount paid by the bank under such certification is recoverable by it.*

See **NAT. PARK BK. v. STEELE & JOHNSON MFG. CO.**..... 81

— *The admission of improper evidence in an equity case — not a ground for the reversal of the judgment.*

See **McSORLEY v. HUGHES.**..... 360

ESTATES — In real property.

See **REAL PROPERTY.**

ESTOPPEL — *When a party making use of an affidavit is not estopped to deny its truthfulness.*

See **HELWIG v. MUT. LIFE INS. CO.**..... 366

EVIDENCE — *As to the defendant's wealth and family, in an action for slander.] 1. In an action to recover damages because of the utterance of slanderous words by the defendant, charging the plaintiff with being a prostitute and a thief, evidence was given on behalf of the plaintiff to the effect that the defendant had no children, and that he had property of the value of \$50,000, in regard to which the trial justice charged the jury that the evidence had been permitted, "not for the purpose of affecting your judgment as to the amount of damages he should pay, because you will not be permitted to enhance the damages for the reason that the defendant is a wealthy man, and the evidence was not allowed in the case for any such purpose whatever, but it was allowed for the sole purpose of showing the effect that was to be given to the language uttered by this particular individual."*

Held, that, in an action for slander or libel, the pecuniary circumstances of the defendant are not involved in the issue; and evidence showing him to be rich or poor is not admissible on the question of damages.

ENOS v. ENOS...... 45

2. — *Where the error is not cured by the judge's charge a new trial will be granted.] That the error in this case was not cured by the charge of the*

EVIDENCE — Continued.

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justice that the evidence was proper to enable the jury to determine what weight would be given to the defendant's words.

That a new trial should be granted, as the jury might well have reasoned that the defendant being a man of wealth, and having no family dependent upon him, they should render a larger verdict than if these facts did not exist. *Id.*

3. — *Denial of knowledge as to incorporation.*] Upon the trial of an action, in which the complaint alleges that the plaintiff was a corporation organized and doing business under and by virtue of the laws of the Kingdom of Norway and Sweden, and the answer of the defendants is, "upon information and belief, they deny the plaintiff ever was or now is a corporation," it is not necessary for the plaintiff to prove its existence as a corporation.

By section 1776 of the Code of Civil Procedure, such proof is not required, unless the answer is verified "and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation;" and by section 1779 it is provided that "an action may be maintained by a foreign corporation in like manner, and subject to the same regulations as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law." *VULCAN v. MYERS* 161

4. — *Trade-mark — proof required in an action to prevent its use.*] In order to maintain an action to prevent the use of a trade-mark by another, the law does not require proof that the trade-mark used by the defendant is a perfect or complete simulation or resemblance of that of the plaintiff.

Where the evidence is such as to present the question whether the resemblance of one trade-mark to another is such as will probably deceive purchasers, it is not necessary for the plaintiff to present further proof showing that purchasers have, in fact, been deceived by the defendants' simulations of his trade-mark. *Id.*

5. — *As to a personal transaction with a person, since deceased, as to his having been present.*] To state the names of the persons in a room at a certain time is not testimony concerning a personal transaction between the witness and one of them, and such testimony is admissible, although the witness may be interested in the action and one of the parties who was in the room has died before the trial. *GREER v. GREER*.... 251

6. — *Privileged communication to an attorney.*] The testimony of an attorney that he drew a deed for one Scott and took his acknowledgment, and that the description in the deed embraced a certain parcel of land, is not a privileged communication where it appears that the deed was drawn, executed and acknowledged in the presence of the grantee. *Id.*

7. — *Stipulation as to objections.*] A stipulation "that all objections and exceptions to evidence be considered as taken by all the parties whose interests are antagonistic to that of the party offering the evidence, and that all available objections, under sections 829 and 835, were taken, and when overruled, that exceptions were taken," is not available on an appeal. *Id.*

8. — *Trial for petit larceny — proof of similar transactions having taken place elsewhere.*] On a trial upon the charge of petit larceny alleged to have been committed by the accused in stealing ten dollars, the property of one Dayton, it appeared that the defendants went into Dayton's store, asked to purchase some candy and tendered a twenty-dollar bill in payment therefor, for which they received back nineteen dollars and some change. Thereupon one of the defendants, stating that he had found sufficient money to purchase the candy, requested Dayton to hand back the twenty-dollar bill, which was done, and some money was returned, which at the time Dayton supposed to be the money he had given in exchange for the twenty-dollar bill, but which was, in fact, ten dollars less.

Held, that evidence that the defendants, on the same evening and at another place were guilty of a similar transaction, was competent.

PEOPLE v. WILLIAMS. 278

9. — *Physician — cannot testify on whom he relied for payment of his services.*] In an action by a physician to recover for medical services to a wife, against the husband and wife, the wife alone answered, setting up her

EVIDENCE — Continued.

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coverture, alleging that the services were rendered for her husband. On the trial the plaintiff was asked: "When you rendered the services, to recover for which this action is brought, on whom did you rely for your pay?" To which the defendant objected. The objection was overruled and the plaintiff answered: "On the defendant Lottie McGill."

Held, that the question was inadmissible; that the real question in the case was as to who was liable for this bill, the wife or the husband, which must depend upon the facts constituting the contract under which the services were rendered.

That it did not lie with the plaintiff to determine these questions, or fix the liability by any intention on his part, as to the person upon whom he relied for the payment for his services. *POPE v. MCGILL*..... 294

10. — *Proposals for a settlement — admission of a fact — offer to settle.*] Negotiations or proposals looking towards the settlement of a controversy without action, cannot be received in evidence as admissions of liability. This rule, however, does not extend to an admission of a disputed fact, even though made in the course of such negotiations. *SLINGERLAND v. NORTON*..... 578

11. — *Proof of a settlement made with another person.*] An offer or consent or expression of willingness to settle cannot be considered as an admission of liability, nor is evidence of the fact of the settlement, without litigation, of the claim of another party arising out of the same transaction, competent against the party effecting the settlement. *Id.*

12. — *Unsworn statement of a child.*] It is not proper or permissible on a criminal trial, where a child of eight years of age is called as a witness, who shows from his testimony that he has no apprehension of the nature of an oath, to permit him to testify without being sworn, and accept the unsworn statement of the witness for what it is worth. *PEOPLE v. FRINDEL*..... 483

13. — *Quarrelsome character of a complainant against one indicted for an assault.*] On the trial of a prisoner charged with having committed an assault in the second degree, the quarrelsome character of the complainant cannot be shown by proof of specific acts on his part, nor is evidence as to his general reputation in that respect admissible, where it is not claimed by the prisoner that the act complained of was committed in self-defense. *Id.*

— *Delivery of trust deeds — presumed from their acceptance by the trustee and recording, though afterwards found in the grantor's possession — when not void as made in contemplation of marriage — effect of subsequent representations and possession of the property by the grantor.*

See BLISS v. WEST..... 71

— *Negligence — town highway out of repair — acts and declarations of the highway commissioners subsequent to the accident, how far evidence against the town — evidence as to the subsequent repair of the highway.*

See STONE v. TOWN OF POLAND..... 81

— *What acts and statements of one conspirator are competent against the other — record of acquittal of one of two parties indicted for murder — admissibility of it on the trial of the other conspirator.*

See PEOPLE v. KIEF..... 387

— *Surrogate — power of a surrogate, the successor of one who has admitted a will to probate, to certify a copy of the original will and to sign the record of probate — variance between such copy and the record of the probate of the will.*

See FETES v. VOLMER..... 1

— *Master and servant — sub-contractor, of one contracting with a city to do the entire work — the city is not liable for his negligence — proof of damage resulting from loss of time.*

See WOOD v. CITY OF WATERTOWN..... 298

— *Special partner — the turning over of notes to the limited partnership is not a payment in cash of special capital — competency of partnership books as evidence.*

See KOHLER v. LINDENMEYER..... 513

— *Mutual accident association — recovery under a certificate thereof — necessity of evidence as to the amount which an assessment would produce.*

See CRAM v. EQUITABLE ACCIDENT ASSN..... 11

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— *Proof as to the absence of contributory negligence — from what facts the taking of proper precautions may be presumed.*

See *WIWIROWSKI v. LAKE SHORE AND M. S. R. Co.*..... 40

— *The possession of a bond and mortgage by the agent effecting the loan — confers no authority to receive the principal thereof before it becomes due.*

See *SCHERMERHORN v. FARLEY*..... 66

— *When a case should be submitted to the jury, although the evidence is uncontradicted.*

See *ROSEBERRY v. NIXON*..... 121

— *The admission of improper evidence in an equity case — not a ground for the reversal of the judgment.*

See *McSORLEY v. HUGHES*..... 360

— *Employment of a boy under thirteen years of age — not alone and of itself evidence of negligence.*

See *WHITE v. WITTEMAN LITHOGRAPHIC Co.*..... 381

— *Complaint for embezzlement and fraudulent misapplication of money — proof required of the plaintiff.*

See *PANAMA R. R. Co. v. JOHNSON*..... 557

— *Jury — need not be thoroughly satisfied in a civil action.*

See *O'DONOHUE v. SIMMONS*..... 467

— *Felonious intent in grand larceny — evidence as to.*

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— *As to the method of offering evidence, excepting to its admission or rejection, etc.*

See **TRIAL.**

EXAMINATION — Of a party before trial.

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EXCEPTIONS — On appeal.

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EXECUTION — Supplementary proceedings — the order for the examination of the debtor must be made returnable before one of the officers mentioned in section 2434 of the Code of Civil Procedure.

See *PECK v. BALDWIN*..... 308

— *Guaranty to pay all notes which should "prove to be uncollectible" — not enforceable until judgment and execution returned unsatisfied.*

See *RALPH v. ELDREDGE*..... 208

EXECUTORS AND ADMINISTRATORS—*An administrator who negotiates a sale of the real estate of his intestate, conveyed by the deed of the heirs, is liable for the money received by him therefor and deposited in a bank which fails.] An administrator of an estate, who negotiates the sale of a farm which belonged to his intestate, and which is conveyed by a deed signed by the children of the intestate, the purchase-price of which is received by the administrator, and is deposited by him in a bank which subsequently fails, is liable for the money lost through the failure of the bank.*

It is the duty of the administrator, in such a case, to at once pay over the money to the parties entitled thereto, and in receiving and depositing such money he does not act within the rule that a trustee or public officer, who deposits money in a bank of good standing, without negligence on his part, will not be liable if the bank fails. *HARLOW v. MILLS*..... 891

— *Relief fund of a mutual benefit association — when it goes to the heirs-at-law free from the claims of creditors of the deceased member.*

See *BEECKEL v. ORDER OF UNITED FRIENDS*..... 7

— *Will — equitable conversion of real estate into personalty.*

See *FRASER v. MCNAUGHTON*..... 80

— *Costs on the reference of a disputed claim against an estate.*

See *MATTER OF MCQUEEN*..... 173

EXECUTORS AND TRUSTEES — *May recover the damage caused to property by an elevated railroad, as well that caused before as that arising after their testator's death — effect of acquiescence in a trespass — remedy.*

See KNOX v. METROPOLITAN EL. RY. CO. 517

— *Action for an accounting and the construction of a will by the executors and trustees thereof — questions arising between a legatee and his assignee may be determined in such an action.*

See BARNES v. BLAKE 525

EXPRESS COMPANIES :

See CARRIERS.

EXTRA ALLOWANCE :

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FALSE CERTIFICATE — *That stock is paid in full.*

See CORPORATIONS.

FALSE REPRESENTATIONS — *Mutual accident association — recovery under a certificate thereof — effect of misrepresentations in the application.*

See CRAM v. EQUITABLE ACCIDENT ASSN. 11

— *Annual report of a corporation — what false statement as to the capital paid in, is not a material false statement, rendering the officers signing the report liable for its debts.*

See WALTON v. GODWIN 87

— *Order that an answer be made more definite and certain — granted where the complaint alleges, generally, false representations to have been made by agents of a corporate plaintiff.*

See TEXAS, ETC., OIL CO. v. MUT. FIRE INS. CO. 500

FARM CROSSINGS :

See RAILROAD.

FEEs — *Of public officers.*

See OFFICERS.

FENCES — *Obligation of railroad to maintain.*

See RAILROAD.

FIRE ESCAPES — *Fire escapes in a manufactory — duty of the owner to erect them, without notice from the commissioner.] Under the statute (§ 16 of tit. 14 of chap. 583 of the Laws of 1888), directing that any building occupied, or built to be occupied, as a manufactory "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioner," the duty rests upon the owner to bring the subject before the commissioner and obtain his direction in the premises; and where an accident occurs, because of the absence of such fire-escapes from the building, the owner cannot avoid responsibility by alleging that the statute does not declare absolutely that fire-escapes shall be erected by the owner, but only that "such fire escapes and doors as shall be directed and approved by the commissioner" shall be erected, or by alleging that he had no personal knowledge that the fire-escapes were not erected as required by law. McLAUGHLIN v. ARMFIELD. 876*

FIRM :

See PARTNERSHIP.

FISH — *Action for penalties under the laws to protect fish (§§ 23, 24, chap. 534 of 1879; chap. 127 of 1884; chap. 11 of 1886) — the authority of the proper officer must appear.*

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— *Change of venue — not prohibited in an action for penalties under the game law, chapter 577 of 1888.*

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FOREIGN MISSIONS — *The Board of Foreign Missions of the Presbyterian Church is not exempt from the collateral inheritance tax on legacies to it.*

See MATTER OF BOARD OF FOREIGN MISSIONS 116

FRAUD — *Complaint for embezzlement and fraudulent misapplication of money — proof required of the plaintiff.]* In order to recover, in an action in which the defendant is charged to have embezzled and fraudulently misapplied the plaintiff's money while acting as its agent, it is necessary for the plaintiff to establish, not only the receipt of the money by the defendant, but its embezzlement or fraudulent misapplication by him; and the burden of proof during the whole progress of the trial rests upon the plaintiff to establish those two propositions.

An entirely different rule prevails in an action for money had and received.

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FRAUDULENT CONVEYANCES — *Trust for the benefit of the grantor and others — invalid as against the creditors of the grantor to the extent of his interest only.*

See SLOAN v. BIRDSALL..... 817

— *By a debtor.*

See ASSIGNMENTS.

FREIGHT — *Carried by railroad.*

See RAILROAD.

GAME LAWS — *Chap. 534 of 1879, chap. 584 of 1880 — forbids the sale of live as well as of dead birds.]* 1. Under section 12 of chapter 534 of the Laws of 1879, as amended by chapter 584 of the Laws of 1880, providing that "no person shall at any time, in this State, kill or expose for sale, or have in possession after the same is killed, any eagle, wood-pecker, night-hawk, yellow bird, wren, martin, oriole or any song bird, under a penalty of five dollars for each bird so killed, exposed for sale or had in possession," a person who exposes for sale any of the birds mentioned in said act is liable to the penalty imposed thereby.

The act is to receive the same construction as if it had read: "No person shall expose for sale any eagle," etc.

The said statute was not repealed by section 1 of chapter 427 of the Laws of 1886. PEOPLE v. FISHBOUGH 404

2. — *Repeal of statutes.]* Repeals of statute by implication are not favored in law, and the earlier statute will remain undisturbed unless the language of the latter act indicates an intention to abrogate the former, or to prescribe the only rule which shall govern the case for which provision is made, or unless the two statutes are incompatible or repugnant. *Id.*

— *Action for penalties under the laws to protect fish (§§ 23, 24, chap. 534 of 1879, chap. 127 of 1884; chap. 11 of 1886) — the authority of the proper officer must appear.*

See PEOPLE v. BELKNAP 241

— *Change of venue — not prohibited in an action for penalties under the game law (chap. 577 of 1888).*

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GRAND LARCENY — *Felonious intent in grand larceny — evidence as to.*

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GRANTOR AND GRANTEE — *Of real property.*
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GUARANTY — *Contract of.*
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HEALTH BOARDS — *Power of, to direct the abatement of a nuisance, without giving notice to the party charged with maintaining it.]* The Board of Health of the Town of Seneca Falls, acting under chapter 270 of the Laws of 1885, as amended by chapter 309 of the Laws of 1888, made an order without notice to a railroad company, requiring the latter to make two openings of a hundred feet each, in an embankment extending from the west shore of Cayuga lake, upon which it operated a railroad, so as to permit the free flow of the waters of the lake through them northwardly.

Held, that the duties of the board, in respect to inquiring into and determining whether or not a nuisance existed, were of a *quasi* judicial nature, and that the omission to give notice to the railroad company of the action proposed to be taken, was fatal to the regularity of the proceedings.

That the power given to the Board of Health, by subdivision 4 of section 3 of the said act, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances," etc., by necessary implication, required the board to give a reasonable notice to the person who was charged with the maintenance of a nuisance that complaint had been made, or that such fact existed, so that he might be heard, in his own behalf, in refutation of the charge made against him.

In the absence of any prescribed length of notice a reasonable opportunity is implied, and should be afforded to the party charged with maintaining a nuisance, to defend his conduct. **PEOPLE v. BOARD OF HEALTH**..... 595

HEARSAY — *Evidence.*
See EVIDENCE.

HIGHWAYS — *Negligence — town highway out of repair — acts and declarations of the highway commissioners subsequent to the accident, how far evidence against the town — evidence as to the subsequent repair of the highway.*

See **STONE v. TOWN OF POLAND**..... 21

— *Conditions under which land is taken for a highway — cannot be done away with by the legislature to the prejudice of adjoining owners, without compensating them.*

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— *Flagman at railroad crossing — constitutionality of an order of court requiring it, under chapter 439 of 1884.*

See **PEOPLE v. LONG ISLAND R. R. Co.**..... 412

— *Municipal corporation — liability of, for an injury to one falling into an excavation near the sidewalk.*

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— *Supervisors — authority of, to appoint commissioners to lay out a highway.*

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HUSBAND AND WIFE — *Delivery of trust deeds — presumed from their acceptance by the trustee and recording, though afterwards found in the grantor's possession — when not void as made in contemplation of marriage — effect of subsequent representations and possession of the property by the grantor.*

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IGNORANCE — *Mistake arising from.*
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INFANT — *Employment of a boy under thirteen years of age — not alone and of itself evidence of negligence.*]. Evidence simply of the employment of a boy under thirteen years of age, in violation of the statute, does not, alone and of itself, establish negligence upon the part of his employer. The violation of the statute is evidence only upon the question of negligence, but to establish it other evidence of negligence and freedom from contributory negligence must be given. *WHITE v. WITTEMAN LITHOGRAPHIC Co.*..... 381

— *Negligence of a child in whose charge a younger sister is at the time of an accident to the latter — how far it bars the recovery of damages.*
See *WILLIAMS v. GARDINER* 508

— *Collateral inheritance tax — a child adopted under the laws of Massachusetts is not liable to.*
See *MATTER OF BUTLER*..... 400

— *Effect of payment of money to the father of an injured minor and the execution of a release by the minor.*
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INJUNCTION — *The mere failure to assert his rights while an elevated road is in process of construction does not preclude an abutting owner, damaged thereby, from maintaining an action for damages or an injunction.*
See *KNOX v. METROPOLITAN EL. RY. Co.*..... 517

— *Actor agreeing to render exclusive service to one — when restrained by injunction from acting for another.*
See *CARTER v. FERGUSON*..... 569

— *Against the trustees of a mortgage acting in bad faith to the bondholders.*
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INSOLVENCY — *Effect, as regards an accommodation maker of a note, of an acceptance of a dividend from the estate of the payee under the insolvency laws of another State by the creditor, a resident thereof.*
See *THIRD NAT. BK. v. HASTINGS* 531

— *A trustee and stockholder of an insolvent corporation cannot, as a creditor, attach his property.*
See *THROOP v. HATCH LITHOGRAPHIC Co.*..... 149
See BANKRUPTCY.

INSURANCE — *Statement, in the application for a life policy, of the name of the last physician attending the applicant*] 1. In an action brought to enforce payment of a life insurance policy, it appeared upon the trial that the application for the insurance contained a statement by the deceased that the last physician by whom he was attended was Dr. Langeman, whereas, in fact, Dr. Fahs had attended him at a later date.
The court, on that ground, was asked to direct a verdict in favor of the defendant. This it declined to do, but instructed the jury that, if the attendance of Dr. Fahs was for a real or supposed disease, the verdict should be for the defendant.

INSURANCE — Continued.

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Held, that the request was properly denied; that the limitation was a correct one, as the purpose of the question put to the applicant was to ascertain the name, not of the last physician who attended him, but of the last one who attended him for a disease. **HELWIG v. MUT. LIFE INS. CO.** 366

2. — *When a party making use of an affidavit is not estopped to deny its truthfulness.*] While, ordinarily, a party who makes use of an affidavit thereby represents it to be truthful, yet the verified statement of the attending physician accompanying the proofs of death under a policy of insurance, as it is required as a condition of the policy, cannot be regarded as legal evidence in favor of either party to an action upon the policy. *Id.*

3. — *Company — when a "surety company" is an insurance company and subject to a tax on its premiums.*] The American Surety Company, incorporated under chapter 463 of the Laws of 1853, and chapter 485 of the Laws of 1879 amendatory thereof, is an insurance company, although not so designated in its name, and is subject to the tax of eight-tenths of one per cent on the gross amount of its premiums under section 5 of chapter 361 of the Laws of 1881.

The provisions of section 4 of chapter 679 of the Laws of 1886, to the effect that the personal property, franchises and business of all insurance companies shall be exempt from taxation, except as provided in that act, are limited to fire and marine insurance companies, and do not apply to the American Surety Company. **PEOPLE EX REL. AM. SURETY CO. v. WEMPLE.** 248

4. — *Mandamus — to compel a mutual benefit association to make an assessment.*] After a judgment has been recovered, upon a certificate of insurance, against a mutual benefit association which has refused to make an assessment for the purpose of paying an amount payable under the terms of the same, and an execution issued thereon has been returned unsatisfied, the association will be compelled by a *mandamus* to make an assessment for the purpose of obtaining the fund with which to pay the certificate.

PEOPLE EX REL. MYERS v. MASONIC GUILD, ETC. 395

— *Mutual accident association — recovery under a certificate thereof — necessity of evidence as to the amount an assessment would produce — effect of misrepresentations in the application.*

See **CRAM v. EQUITABLE ACCIDENT ASSN.** 11

— *Relief fund of a mutual benefit association — when it goes to the heirs-at-law free from the claims of creditors of the deceased member.*

See **BEECKEL v. ORDER OF UNITED FRIENDS** 7

INTENT — In criminal cases.

See **CRIMES.**

— *Presumption and evidence of.*

See **EVIDENCE.**

INTEREST — On a bond and mortgage — at what rate chargeable — voluntary payment.

See **WILCOX v. VAN VOORHIS** 575

IRREGULARITY — Insolvent debtor's discharge — not vacated because the name of a creditor was misstated in the petition therefor.

See **WHEELER v. EMMELUTH** 369

ISSUES — Trial of.

See **TRIAL.**

JOINDER — Of causes of action.

See **MISJOINDER.**

JUDGES — Supreme Court justice — the pension on his reaching the age of seventy years is not conditional on his having served ten years of the abridged term.] It is not necessary, in order to entitle a justice of the Supreme Court to receive the annual sum of \$1,200, provided for by section 1 of chapter 541 of the Laws of 1872, after he has retired from office by reason of having reached the age of seventy years, that he should have served ten years during the term of office which is abridged by reason of his reaching the age of seventy

JUDGES — *Continued.*

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years during such term, but said justice is entitled to the pension, where he has served as a justice for ten years, during either one or more terms, prior to such abridgment of his term of office. **PEOPLE EX REL. GILBERT v. WEMPLE**, 275

JUDGE'S CHARGE — *To the jury.*

See TRIAL.

JUDGMENT — *Eminent domain — easement taken by an elevated railroad — value thereof not conclusively determined by a judgment granting an injunction, to become inoperative upon the payment of a specified sum.]* 1. In proceedings to condemn, under the exercise of the right of eminent domain, the easements, necessary for the operation of an elevated railway, in front of certain premises in the city of New York, the owners of the easement sought to be taken offered in evidence, before the commissioners appointed to make the appraisal of damages, judgments recovered in actions against the railroad by such owners to prevent the operation of the road. By these judgments an award of damages was made in each case, and the value of the easements was determined, and it was therein further provided, that upon payment of the sum mentioned in such judgments a conveyance should be executed by the owners thereof, and that the injunction, which was otherwise granted by such judgments, should in that event become inoperative.

Held, that the judgments were not decisive between the parties, upon the question as to the value of the easements sought to be taken, in the proceedings to condemn them, and were properly rejected by the commissioners.

MATTER OF METROPOLITAN EL. RY. CO. 568

2. — *Opening a judgment entered by default — what proof of good faith required.]* On an application to open a default the applicant must not only show a reasonable ground for opening the default, but the burden is upon him to establish his good faith otherwise than simply by making an affidavit of merits. **DEANE v. LOUCKS** 555

3. — *A recovery for work done and materials furnished is a bar to a claim for defective work and materials.]* A judgment by default, in an action to recover for work, labor and services and for materials furnished, is a bar to any action by the defendant for damages because of defective work or materials. *Id.*

— *Supervisor — right to compromise an action, although the judgment therein is chargeable to the town — right of the town to order an appeal to be taken.*

See HULBURT v. DEFENDORF. 585

— *Guaranty to pay all notes which should "prove to be uncollectible" — not enforceable until judgment and execution returned unsatisfied.*

See RALPH v. ELDREDGE 208

— *Assignment of — liability of the assignee for costs, where the judgment is reversed on appeal.*

See TUCKER v. GILMAN. 167

JUDICIAL SALE — *Chattel mortgage — sale of the chattels in bulk, and at a place where they were not in view of the purchasers — such a purchase by the mortgagee does not extinguish the equity of the mortgagor.*

See SHERMAN v. SLAYBACK. 255

— *Rent collected by a receiver, in advance, for a period extending beyond the date of the sale of the property — apportionment of the rent.*

See COWEN v. ARNOLD. 487

JURISDICTION — *Surrogate — cannot, even with the consent of all parties in interest, admit to probate the will of a citizen of the State not a resident of his county*

See MATTER OF ZEREGA. 505

— *Powers of courts.*

See COURTS.

JURY — *When a case should be submitted to a jury, although the evidence is uncontradicted.*

See ROSEBERRY v. NIXON. 121

JURY — Continued.

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— *Misconduct on the part of the jury requiring that a new trial be granted.**See* PEOPLE v. SCHAD 571**LACHES** — *Assessment — proceedings to vacate — laches in making the application — effect thereon, of the payment of the assessment — statute of limitations.**See* MATTER OF HAZLETON..... 112**LAND :***See* REAL PROPERTY.

LANDLORD AND TENANT — *Lease and contract for sale of coal to be mined — right of lessee to make use of any other product than the kind to be paid for under the contract.]* 1. In an action based upon an agreement which had been entered into between the plaintiff and the defendant, under which, for each ton of clean and merchantable coal, exclusive of culm or mine waste, to be passed through a mesh of one-half square inch, taken from certain coal lands in the State of Pennsylvania, the defendant was required to pay twelve and one-half cents, the complaint alleged that the defendant in preparing the coal for market used a mesh five-eighths of an inch square instead of half an inch square, in consequence of which ten per cent of all the coal mined, or 80,000 tons, had passed through the five-eighths mesh, which would have gone over the half-inch mesh.

It was also alleged that the defendant had prepared what was known as pea coal, by screening the coal which had passed through the five-eighths mesh over a mesh of seven-sixteenths of an inch.

And, also, that the residue of the coal remaining after the preparation of the pea coal was again screened by the defendant and separated into two grades, buckwheat and birdseye coal, and that 100,000 tons of such coal had been taken and carried away by the defendant.

And, further, that although the defendant had mined and taken away from the land at least 1,200,000 tons of coal, it had paid the plaintiff for less than one-half that amount, and asked for a general accounting for the value of all coal mined.

At the time the contract was made all the sizes of coal, called pea, buckwheat and birdseye, were considered worthless, and were included in the waste products of the mine under the name of culm.

Held, that there was no intention on the part of the plaintiff to convey to the defendant any beneficial result of the mining operations, as a gratuity.

That it was the duty of the defendant to pay for all coal mined and taken out, in pursuance of the agreement, exclusive of the coal which possessed no marketable quality.

That while the defendant might not have had a right, under the terms of the agreement, to utilize the culm, yet, having done so the product became a part of the subject-matter of the contract and gave the plaintiff the right to insist upon compensation therefor.

That, in any event, the defendant had utilized the culm, in which the agreement gave him no rights, which was, in fact, owned by the plaintiff, who thereby acquired a cause of action against the defendant.

GENET v. D. AND H. CANAL CO..... 492

2. — *A covenant to pay rent, and a covenant to pay at the expiration of the lease one-half of the appraised value of buildings erected by the tenant, when dependent covenants.]* A lease of certain premises in the city of New York contained covenants for the payment of rent, taxes, etc., by the lessees, and a grant, in consideration thereof, for the period of twenty-one years from May 1, 1867. It further provided, that in case of the non-payment of rent, or, if default should be made in any of the covenants contained in the lease, that the lessors should have the right wholly to re-enter upon said premises and remove all persons therefrom, and the same to have again, repossess and enjoy as in their first and former estate. The lessees covenanted to erect a building upon the demised premises of certain dimensions, which it was agreed should, at the expiration of the term, be appraised, and either one-half of the appraised value be paid to the lessees or that the lessors would give a renewal of the lease.

The lessees made default in the payment of rent and taxes during the term, and, in December, 1879, were dispossessed in summary proceedings.

LANDLORD AND TENANT — Continued.

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The term of the original lease having expired in May, 1888, an action was brought by the successors of the lessees to have the value of the building, which had been erected by the lessees, appraised and to have one-half of its appraised value paid to the plaintiffs.

Held, that the provision of the lease that in case of a default upon the part of the lessees the lessors might re-enter and enjoy the premises, as in their first and former estate, showed an intention that, in case of a default upon the part of the tenants, the whole estate should revert to the lessors unincumbered by anything that the lessees might have done.

That the covenants as to the effect of a default, and as to the right to recover the appraised value of the building, were to be considered dependent, and not independent, covenants. *BATES v. JOHNSTON*..... 528

8. — *Right of a tenant, evicted for non-payment of a tax, to tender payment of the tax and be restored to possession under section 2256 of the Code.*] A tenant who has been removed from the demised premises, after a default in the payment, for sixty days after the same became payable, of any taxes or assessments upon the demised premises which he had agreed to pay, cannot avail himself of the provisions of section 2256 of the Code of Civil Procedure, which allows the tenant, at any time within one year after the execution of the warrant, when the unexpired term of the lease exceeds five years, to pay or tender to the landlord all rent in arrear at the time of the payment or tender, with interest and the costs and charges incurred by the landlord, and thus restore himself to the possession of the premises and the advantage of his lease.

WITTY v. ACTON..... 558

4. — *Injury to the tenant from defective stairs — liability of the landlord.*] In an action brought by a tenant to recover the damages resulting from an injury received by him through the alleged defective condition of the stairs in the demised premises, the jury were charged that if the stairs at the time of the letting were weak, to an extent that could be easily ascertained upon inspection, a verdict might be rendered against the landlord.

Held, that this charge would impose upon the owner of real property the duty of active vigilance to see whether the premises he was about to rent were in good condition, and was erroneous,

That the law imposed upon the tenant the risk of such defects in the demised premises as were visible upon inspection. *AKERLY v. WHITE*..... 362

— *Rent collected by a receiver, in advance, for a period extending beyond the date of the sale of the property — apportionment of the rent.*

See COWEN v. ARNOLD..... 487

LEASE:

See LANDLORD AND TENANT.

LEGACY — *Collateral inheritance tax — exemption therefrom — the legatee must be absolutely and unqualifiedly exempt from general taxation.*

See MATTER OF VASSAR..... 878

— *Action for an accounting and the construction of a will by the executors and trustees thereof — questions arising between a legatee and his assignee may be determined in such an action.*

See BARNES v. BLAKE..... 525

LEGISLATURE — Powers of.

See CONSTITUTIONAL LAW.

LEVY — Under an attachment.

See ATTACHMENT.

LICENSES — *To sell meat in a village — penalties for selling without a license, authorized by section 3, title 3 of chapter 291 of 1870.*] In an action to recover three penalties of ten dollars each, alleged to have been incurred by the defendant because on three different days he peddled meat in the village of Ballston Spa, not having obtained a license therefor, it appeared that the plaintiff, the Village of Ballston Spa, was incorporated under the general act for the incor-

LICENSES — Continued.

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poration of villages (Laws of 1870, chap. 291), and that its board of trustees had passed the following ordinance: "All persons within the corporate limits of this village who shall hawk or peddle meat * * * in any of the streets of this village shall pay a license" of thirty dollars therefor, and had also prescribed a penalty of ten dollars for selling without a license.

Held, that the ordinance was authorized by section 8 of title 8 of said chapter 291 of 1870.

That this ordinance tended to restrain and prevent the hawking or peddling of meat; and that although it also imposed a tax it was not, therefore, prohibited.

That the matter was of a purely domestic character, and that the power exercised was valid and within the constitutional competency of the legislature.

VILLAGE OF BALISTON SPA *v.* MARKHAM 238

— *The granting of a license to have an exhibition in the city of New York is discretionary with the mayor.*

See PEOPLE EX REL. WORTH *v.* GRANT 455

LIEN — *For service by a stallion — upon a mare and colt in the hands of one purchasing the mare before the filing of a notice of the lien.*] In an action brought to foreclose a lien for twenty-five dollars, which the plaintiff claimed for service of his stallion rendered to the mare of the defendant, it appeared that a written statement had been filed in the proper clerk's office, under the provisions of chapter 458 of the Laws of 1887, as amended by chapter 457 of the Laws of 1888, and that a certificate or license had been issued by the county clerk to the owner of the stallion, and that a notice of lien had been filed and recorded, as required by section 8 of said act, in the clerk's office, before the expiration of six months from the date of service; but that the mare had been purchased by the defendant in the action after such service, and before any notice of lien was filed.

Held, that a lien was created, *in presenti*, from the time of service, which could only be defeated by the failure of the owner of the stallion to file a notice of the lien within the time prescribed by the statute.

TUTTLE *v.* DENNIS 85

— *Corporation—covered by the words "person or persons" in the lien law—§ 1824, chap. 410 of 1882—error in the amount stated in the notice of lien to be due.*

See GASKELL *v.* BEARD 101

LIFE INSURANCE:

See INSURANCE.

LIMITATION OF ACTION — *Agreement to pay on the sale of a vessel and to give notice of the sale — when the statute of limitations begins to run.*] 1. An action was brought, on August 2, 1888, to recover upon a written obligation, in which the defendants' testator admitted himself to be indebted to the plaintiff in the sum of \$30,000, which was to be due and payable when the steamship "Illinois" should be disposed of by sale, gift or loss, the agreement stating that said sum should not be "due or payable until a sale and transfer of the said steamship Illinois is perfected, in which event I hereby promise and agree to notify said Hall of her disposal, and within ten days thereafter to pay the full amount." A sale of the vessel took place in 1864, about eight months after the contract was made, of which the plaintiff was not informed until in 1887, although inquiries had been made of the testator, in respect thereto, prior to his death in the year 1880.

Held, that the money was neither due nor payable until the expiration of ten days after the plaintiff had received notice of the sale of the vessel; and that the statute of limitations did not begin to run until the plaintiff ascertained, in 1887, that the vessel had been sold. HALL *v.* ROBERTS 539

2. — *Acknowledgment of an indebtedness — to avoid the statute of limitations it must be one intended to be communicated to the creditor.*] An acknowledgment of an indebtedness, in order to prevent the running of the statute of limitations, must be one intended to be communicated to the creditor, or to influence his conduct, and a written memorandum made by the debtor, and kept in her possession up to the time of her death, and thereafter found

LIMITATION OF ACTION — Continued.

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among her papers by her executor, is not such an acknowledgment as will take the claim out of the statute. *SMITH v. CAMP*..... 484

— *The statute of limitations is not a bar to an application made to the court, under chapter 838 of the Laws of 1858, and its amendments, sections 897-914 of chapter 410 of 1882, to vacate an assessment, although not made within ten years after the confirmation of the assessment, where the proceedings to vacate such assessment are instituted within such ten years.*

MATTER OF HAZLETON..... 112

— *Director of a corporation — liability of, in case of a failure to file an annual report — statute of limitations — presumption that prohibited powers have not been exercised — a deposit made in violation of law becomes due immediately.*

See CHAPMAN v. COMSTOCK..... 825

— *Trust — statute of limitations applicable to a claim which the trustee is directed to pay, where payment thereof is refused by him.*

See HILL v. McDONALD..... 822

LIMITED PARTNERSHIP:

See PARTNERSHIP.

LIS PENDENS:

See PRACTICE.

LOST TICKET — On a railroad.

See RAILROAD.

MACHINERY — Dangerous to employees.

See MASTER AND SERVANT.

MANDAMUS — *The granting of a license to have an exhibition in the city of New York is discretionary with the mayor — a mandamus will not issue against the mayor to compel him to grant the license.*

See PEOPLE EX REL. WORTH v. GRANT..... 455

— *To compel a mutual benefit association to make an assessment.*

See PEOPLE EX REL. MYERS v. MASONIC GUILD, ETC..... 395

MANUFACTORY — *Employment of a boy under thirteen years of age — not alone and of itself evidence of negligence.*

See WHITE v. WITTEMAN LITHOGRAPHIC CO..... 381

— *Fire-escapes in a manufactory — duty of the owner to erect them, without notice from the commissioner.*

See McLAUGHLIN v. ARMFIELD..... 376

MARE — *Lien for services by a stallion — upon a mare and colt in the hands of one purchasing the mare before the filing of a notice of lien.*

See TUTTLE v. DENNIS..... 35

MARRIED WOMAN:

See HUSBAND AND WIFE.

MARSHALING — Of assets.

See DEBTOR AND CREDITOR.

MASTER AND SERVANT — *Sub-contractor, of one contracting with a city to do the entire work — the city is not liable for his negligence.] 1. In an action to recover for injuries alleged to have been sustained through the negligence of the city of Watertown in the work of repairing a bridge over a branch of the Black river, within the limits of that city, it appeared that the bridge was out of repair, and that by reason of repairs being made thereon it was rendered impassable for teams, although it was used during the daytime by foot passengers; that, a few days before the accident, an alderman of the city, discovering that one of the shoes of the bridge was broken, directed the Bagley & Sewell Company to have new shoes put on. The shoes for the bridge were cast by that company, which employed Henderson and Hill, who were competent and skilled mechanics and fully qualified to do the*

MASTER AND SERVANT — Continued.

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work, to remove the old shoes and replace them with the new ones. While Henderson and Hill were engaged in this work the accident occurred, and the evidence tended to show that it was caused by their negligence.

Upon the trial the court in its charge, in substance, instructed the jury that the city of Watertown was chargeable with any negligence of which the Bagley & Sewell Company, or its employees, Henderson and Hill, were guilty, and refused to charge that if the Bagley & Sewell Company was employed to do the job of taking off the old and putting on the new shoes with its own men and its own means, and employed Henderson and Hill to help execute the work under its control, that the Bagley & Sewell Company was the superior and responsible for the conduct of the men, although the Bagley & Sewell Company was doing the work for the defendant, and that there could be no recovery against the city of Watertown for any accident happening by reason of the taking off of the shoes by the men in the employment of the Bagley & Sewell Company.

Held, that as the act which the Bagley & Sewell Company was employed to perform was not in any way wrongful, and the plaintiff's injury was not a necessary consequence of the direction to have such act performed, that the city of Watertown could not be held liable for the negligence of Henderson & Hill on the sole ground that they were acting in the employment of the Bagley & Sewell Company which was employed by the defendant.

That the relation of master and servant did not exist between the city of Watertown and Henderson and Hill in this case.

WOOD *v.* CITY OF WATERTOWN 298

2. — *Proof of damage resulting from loss of time.*] Where loss of time is claimed as an item of damage for personal injury occasioned by negligence, if the party fails to prove the value of the time lost, or facts upon which an estimate of such value can be based, only nominal damages can be given to him. *Id.*

3. — *Negligence — use of a steam winch by a seaman — contributory negligence.*] In an action to recover the damages resulting from an injury to the plaintiff's left hand, caused by a steam-winch on board the defendant's steamer, it appeared that the plaintiff shipped as a seaman at the city of New York, and on the morning of the day of the accident was ordered to attend to the working of a winch, in order to control the motion of which the person operating it was required to extend his hand over the wheels to the valve. When the winch was in motion the noise caused by it was so great as to prevent the operator from hearing orders given by the person in charge of the business, and he was obliged to watch that person and operate the use of the winch in accordance with different motions of his hand. While extending his hand across the winch to reach and operate the valve the plaintiff's fingers were caught between the wheels and the injury complained of was received.

Evidence was given tending to show that the winch was unsafe by reason of its being uncovered where the wheels were exposed, while the defendant proved that no accident had previously happened from it, and that the hand of the operator, extended to reach the valve, was not required to go nearer than from six to ten inches of the wheel.

Held, that, in view of the position occupied by the plaintiff, his obligation to obey the orders of his superiors, and the confidence which would be inspired by such orders when given, he was not chargeable with contributory negligence in this case.

That it was not error to refuse to charge, that if the plaintiff had an opportunity of seeing the winch before the ship sailed, he must be assumed to have sailed with a knowledge of its condition, and could not recover for an injury caused thereby. ELDRIDGE *v.* ATLAS STEAMSHIP CO. 96

4. — *Employee, injured by the fall of an elevator — when the employer is not liable because of there having been no safety clutch on it.*] In an action brought to recover the damages resulting from an injury occasioned to the plaintiff by the fall of an elevator in a building leased to the defendants, it appeared that the plaintiff, while in the employment of the defendants, was engaged in placing barrels upon the floor of an open elevator; that while he was endeavoring to start the elevator it was discovered that a brick had become wedged between the elevator and the wall, rendering the former immovable. A person work-

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ing with the plaintiff, and with his knowledge and at his suggestion, left the elevator to remove the brick, and succeeded in removing it, whereupon, on account of the rope having been slackened in the previous effort to start it, the elevator at once fell into the basement, a distance of about eight feet, seriously injuring the plaintiff, who had remained in the elevator.

This elevator had not been supplied with any safety clutch, but the defendants, who were moving into the premises where the elevator was, were not shown to have had any knowledge of the fact that the elevator had not been provided with such clutch, and the premises had not been long enough in their possession, or subject to their inspection, to charge them with negligence for not ascertaining that this was its condition, there being no proof that the absence of the clutch was so obvious or conspicuous as to be readily seen by persons examining the lofts for the purpose of hiring, which was all that the defendants could have been assumed to have done.

Held, that the defendants could not, under such circumstances, be legally charged with negligence on account of the elevator not having been supplied with a safety clutch. *HANSEN v. SCHNEIDER*.....

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5. — *Negligence — duty of an employer defined.*] In an action to recover for damages claimed to have arisen from the negligence of the defendant, it appeared that a few days before the accident in question the defendant had purchased a force-pump, to be used in applying whitewash to its premises; that the pump had become clogged, and that the plaintiff was sent for to remove a cap from the apparatus in order to put it in working order, and had loosened one of the screws holding the cap in its place when the whitewash was blown into his eyes by the compressed air, causing the injury complained of.

The pump had been manufactured by a company engaged in that business, and had been subjected to the ordinary test to discover whether it was defective, and there was nothing to indicate that the removal of the cap would be attended with any danger.

Held, that as there was no cause for apprehension, there was no negligence in omitting to guard against the accident.

That the law exacts from the employer the exercise of reasonable care and intelligence for the safety and protection of the persons employed, and that when such care and intelligence are exercised the happening of what, at most, are only possible accidents, is part of the risk of the employment against which the person employed is required to guard and protect himself.

KELLEY v. FORTY-SECOND ST. RY. Co...... 98

— *Vicious dog — an employer is not liable for the acts of one kept by his employee on the former's land.*

See SIMPSON v. GRIGGS..... 393

— *Negligence — when a question for the jury.*

See TONNESON v. ROSS..... 415

— *Negligence of the master.*

See NEGLIGENCE.

MEASURE OF DAMAGES:

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MISJOINDER — *Action for an accounting and the construction of a will by the executors and trustees thereof — questions arising between a legatee and his assignee may be determined in such an action.*

See BARNES v. BLAKE..... 525

MISREPRESENTATION:

See FALSE REPRESENTATIONS.

MISSIONS — *The Board of Foreign Missions and Board of Home Missions of the Presbyterian Church are not exempt from the collateral inheritance tax on legacies to them.*

See MATTER OF BOARD OF FOREIGN MISSIONS..... 116

MISTAKE — *Of a bank cashier in certifying negotiable paper as good — when the amount paid by the bank under such certification is recoverable by it.] A promissory note made by Mitchell, Vance & Co., April 14, 1887, for \$3,281.83, at four months from date, to the order of the Steele & Johnson Manufacturing Company for goods sold by it to Mitchell, Vance & Co., was, on August 18, 1887, certified by the National Park Bank, where it was made payable, and thereafter was transferred to the Tradesmen's National Bank and credited to the Steele & Johnson Manufacturing Company. On the day following the note was paid through the clearing-house and the proceeds were received by the Tradesmen's National Bank, and were paid over to the Steele & Johnson Manufacturing Company*

At the time when the note was certified the makers had on deposit with the National Park Bank only \$146.66, and the note was certified under a mistake as to the amount of such deposit. When such mistake was discovered information was sent on August 18, 1887, to Mitchell, Vance & Co., who notified the Steele & Johnson Manufacturing Company, and that company was the next day also notified by the National Park Bank of the existence of such an error, and the money which had been paid upon the note was demanded, but the money was not repaid.

In an action brought by the National Park Bank for its recovery, it appeared that the certification of the note was made by the assistant teller of the bank without any authority from the officers of the bank, and it did not appear that the Steele & Johnson Manufacturing Company had in any way changed its condition by reason of the certification of the note and the payment of the money upon it.

Held, that while the act of the teller in certifying the note, without consulting the state of the account of the makers with the bank, might be careless, yet that that circumstance was not sufficient to prevent the recovery of the money by the bank, and that the bank was entitled to judgment for its repayment.

NAT. PARK BK. v. STEELE & JOHNSON MFG. CO..... 81

— Remedies to correct.

See EQUITY.

MONEY RECEIVED — *Attachment set aside — effect of a reversal of the judgment vacating it upon the rights of subsequent attaching creditors.*

See HAEBLER v. MYERS 179

MONTGOMERY COUNTY — *Overseers of the poor are the sole judges as to who are paupers — audit by town auditors, at what time proper.*

See CHRISTMAN v. PHILLIPS..... 283

MORTGAGE — *Chattel mortgage — sale of the chattels in bulk, and at a place where they were not in view of the purchasers — such a purchase by the mortgagee does not extinguish the equity of the mortgagor.] 1. In an action brought to charge the directors of a corporation, organized under chapter 611 of the Laws of 1871, with liability for its debts, by reason of their failure to file the annual reports required by that act for the years 1886 and 1887, it appeared that the corporation was, on August 24, 1886, indebted to the plaintiff in the action in the sum of \$17,088.84, and on that day mortgaged its furnace, etc., held by it under lease, to secure such indebtedness and surrendered the same to the plaintiffs, who took possession thereof, and thereupon the corporation ceased to transact business.*

On August 13, 1886, the corporation, by its treasurer, executed and delivered to the plaintiffs an instrument in writing, in which it acknowledged itself indebted to the plaintiffs, and, in consideration of an extension of time of payment of the debt and other considerations, it released and surrendered to the plaintiffs its said furnace, adjacent premises and property, of which the paper recited that the plaintiffs had taken possession at six o'clock on that day, and on August twenty-fourth, to secure the indebtedness to the plaintiffs, a bill of sale or chattel mortgage was executed by the corporation of certain chattels

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therein mentioned, providing for the payment of such sum on or before the 1st day of January, 1887.

The corporation having defaulted in its payment the chattels were sold on January 18, 1887, at the door of one of the mills. The sale did not take place in sight of all the property, which was offered for sale in bulk, and not in parcels, and was struck off to one of the plaintiffs for \$1,000, no one except the secretary of the company being present. The property covered by the mortgage exceeded in value the amount of the plaintiffs' claim.

On the 18th day of June, 1887, the present action was brought to charge the defendants, as directors, with the balance of the indebtedness of the company.

Held, that as the object of the sale was to cut off the defendants' right to redemption in equity, that the sale, in order to effect that purpose, must, in all respects, be regular and fair and *bona fide*, and one that would be upheld as a valid sale at common law.

That as this sale was made of personal property which was not within the view of the bidders, and was not sold in separate parcels, that it could not be sustained. *SHERMAN v. SLAYBACK*..... 255

2. — *Effect of the mortgagee retaining possession without a sale.*] *Semble*, that by reason of the invalidity of the sale the mortgagee continued to hold, in his capacity as mortgagee, possession of the chattels, in which the mortgagor still had the equity of redemption, and that the possession and retention by the mortgagee of property of sufficient value to pay the debt without making a valid sale thereof, would operate as a payment and satisfaction of the plaintiffs' claim pending the continuance of such possession thereof by the mortgagee.

Semble, that, as the debt, for which, as directors, the defendants were sought to be made liable, could not have been recovered against the corporation if an action had been brought against it, while this condition of affairs existed, that the directors could not be held liable therefor. *Id.*

3. — *Deed in which the grantee assumes payment of a mortgage on the premises conveyed — when the grantee (although his grantor was obligated to pay the mortgage) cannot be sued by the mortgagee.*] A mortgagor conveyed the mortgaged premises by a quit-claim deed, and his grantee executed to the holder of the bond and mortgage a bond conditioned to pay the amount thereof; such bond was, by its terms, collateral to the bond and mortgage and required the obligee to first exhaust his remedy against the mortgaged premises.

The grantee who gave this bond subsequently conveyed the premises, subject to the payment of the bond and mortgage, by a full covenant deed, by the terms of which his grantee assumed and agreed to pay said bond and mortgage as part of the purchase-money.

Held, that the obligation assumed by the grantee in the last-mentioned deed did not enure to the benefit of the mortgagee, and could not be enforced by him. *WAGER v. LINK*..... 272.

4. — *Trustee of a mortgage acting in bad faith to the bondholders — injunction*] Where it appears that a trust company, which has acted as trustee under a mortgage covering lands in another State, given by a corporation as collateral to bonds issued by it, has acted in bad faith in the prosecution of an action for the foreclosure of the mortgage, and in a manner prejudicial to the interests and rights of the holders of the bonds, such trust company, its officers, agents and attorneys, will be enjoined by the courts of the State of New York from taking any further proceedings in the matter, pending the final hearing and determination of an action for its removal as trustee, although the proceedings in foreclosure are pending in another State, and relate to real estate therein. *GIBSON v. AMERICAN L. AND T. CO.*..... 448

5. — *Foreclosure of a purchase-money mortgage — answer setting up a breach of a covenant of seizin in the deed given by the mortgagee.*] In an action for the foreclosure of a purchase-money mortgage, in which a judgment for deficiency is asked against the mortgagor, an answer setting up a counter-claim for damages arising by reason of a breach of a covenant of seizin contained in the deed of conveyance executed by the mortgagee to the mortgagor may be properly interposed. *MERRITT v. GOULEY*..... 372

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— *A corporation organized under chapter 425 of 1855, and chapter 894 of 1867—power to mortgage its property to a director—enforcement of a mortgage foreclosure judgment against property in the hands of a receiver.*

See PRESTON v. LOUGHRAN..... 210

— *The possession of a bond and mortgage by the agent effecting the loan—confers no authority to receive the principal thereof, before it becomes due.*

See SCHERMERHORN v. FARLEY..... 66

— *Interest on a bond and mortgage—at what rate chargeable—voluntary payment.*

See WILCOX v. VAN VOORHIS..... 575

MOTIONS AND ORDERS—*Two inconsistent orders made on the same motion.] 1. Where two separate, distinct and inconsistent orders are entered upon a single application to the court, with nothing upon the face of the papers to show that one order is to replace, or to be a resettlement of the other, a reversal will be ordered on appeal. MATTER OF SCHELL.....*

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2. — *Assignment by a client of his claim against his attorney—enforcement thereof by the assignee.] Where a client, having a claim against his attorney, arising out of transactions connected with that relation, assigns his claim, the assignee cannot take proceedings to compel the attorney to pay the money, or in case he fails to do so to have him punished as for a contempt of court. Id.*

— *Order that an answer be made more definite and certain—granted where the complaint alleges, generally, false representations to have been made by agents of a corporate plaintiff.*

See TEXAS, ETC., OIL CO. v. MUTUAL FIRE INS. CO..... 560

— *Costs payable as a condition of granting a new trial where a verdict is set aside as against evidence.*

See BUCK v. WEBB..... 185

— *A plaintiff avoiding service of an order will not be heard on a motion to vacate it.*

See DUDLEY v. PRESS PUBLISHING CO..... 181

— *Motion for a new trial.*

See NEW TRIAL.

MUNICIPAL CORPORATION—Assessment—proceedings to vacate—laches in making the application.] 1. In an application, under chapter 888 of the Laws of 1858, and its amendments (§§ 897-914, chapter 410 of 1882), the petition, in proceedings to vacate an assessment, was served upon the counsel to the corporation of the city of New York on August 17, 1880. A notice of the application for an order vacating the assessment upon the petition, and the proofs which had been taken in the meantime, was not served until February 12, 1890.

The application was made upon the grounds that the assessment, which was confirmed March 9, 1875, was for a repavement laid in violation of law and in violation of chapter 326 of the Laws of 1840. It was conceded in the case that there was no tax valuation, and that, under the law of 1840, an assessment could not be made for a local improvement above the amount of one-half of the assessment for the purposes of taxation, and also that non-assessment, for the purpose of taxation, was a sufficient ground for vacating an assessment for a local improvement. The objection of the corporation counsel rested upon the ground.

That the court had no jurisdiction to reduce the assessment, because no notice of the application was given to the counsel to the corporation until more than ten years after its confirmation.

Held, that the petition having been served on the counsel to the corporation within the time, and no objection having been taken at the time that the application was made to the court upon such petition, some years thereafter, that there was a waiver of any such ground of objection on the part of the counsel to the corporation. MATTER OF HAZLETON..... 112

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2. — *Effect thereon, of the payment of the assessment.*] A second ground of objection was that the assessment could not be vacated after payment thereof had been made to the city.

Held, that, as the payment in this case was made after the proceedings to vacate the assessment had been commenced, the right of the applicant to relief was not affected thereby. *Id.*

3. — *Statute of limitations.*] That the statute of limitations was not a bar to the right of the applicant to relief, as although the application was not made to the court within ten years after the confirmation of the assessment, yet the proceedings to vacate the assessment were instituted within such ten years. *Id.*

4. — *Bridge railing—giving way when leaned against—liability of the city to the party injured.*] In an action to recover damages for injuries sustained by the plaintiff in falling from a bridge, which had been accepted as a public highway by the city of Cohoes, it appeared that on the northerly side of the bridge there was a railing against which the plaintiff leaned, whereupon it bent around to the north and the plaintiff fell into the river.

Upon the trial the court granted a nonsuit on the ground that the defendant's duty was limited to the erection of a railing which would render the bridge reasonably safe for public passage, and for such things as were incident to public passage, and that the plaintiff, in leaning against it, was putting the railing to a use for which it had not been designed.

Held, that the nonsuit was improper; that a man, who instead of walking across a bridge pauses for a moment and rests upon its railing, does not lose his right to protection against the negligence of the party charged with its maintenance, and that it was the duty of the city of Cohoes to maintain upon the bridge a railing sufficient to meet all those incidental uses to which it would reasonably be put by persons crossing the bridge, certainly so far as concerned their leaning against it. *LANGLOIS v. CITY OF COHOES*..... 226

5. — *Statutory width of streets not applicable to a bridge.*] It was claimed by the city of Cohoes that, by statute, the streets of the city must be sixty feet wide; that the bridge was only thirty feet in width, and that the city, consequently, had no right to accept it.

Held, that the statute referring to streets and highways did not embrace bridges. *Id.*

6. — *Liability of, for an injury to one falling into an excavation near the sidewalk.*] In an action brought against a municipal corporation to recover damages arising from an injury to the plaintiff, alleged to have resulted from the negligence of the defendant, it appeared that the plaintiff stepped from a sidewalk in a village street into an excavation and was injured; that the excavation was four feet inside of the stoop line of the house on the street, and did not encroach on the sidewalk, and that the sidewalk had a flag-walk, the inside of which was eight feet from the excavation.

No notice of this condition of things, to the village or its officers, was proved, except to a police officer on the day preceding the accident, and he at once notified the owner to guard the excavation.

Held, that the facts in this case did not establish any negligence on the part of the municipal corporation, or justified a recovery against it.

TAYLOR v. VILLAGE OF MOUNT VERNON..... 384

7. — *Assessment for street pavement under section 878 of chapter 410 of 1882.*] The provisions of section 878 of chapter 410 of the Laws of 1882, directing an assessment for the paving of a street in the city of New York, to be made among the owners or occupants of all the houses and lots intended to be benefited thereby, were simply a re-enactment of existing provisions of law, and should be construed with the other laws existing prior to 1882 concerning local improvements in said city. *PEOPLE EX REL. DAVIDSON v. GILON*..... 76

8. — *A horse railroad company should be assessed for such work.*] A horse railroad company is benefited by the laying of a pavement in the street between the rails of its tracks, and is subject to assessment therefor and not to assess such company for such work is a manifest error on the part of

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the assessors, which it is one of the offices of the writ of *certiorari*, authorized by chapter 269 of the Laws of 1880, to correct. *Id.*

— *Master and servant — sub-contractor, of one contracting with a city to do the entire work — the city is not liable for his negligence — proof of damage resulting from loss of time.*

See *WOOD v. CITY OF WATERTOWN*..... 298

— *License to sell meat in a village — penalties for selling without a license, authorized by section 3, title 3 of chapter 291 of 1870.*

See *VILLAGE OF BALLSTON SPA v. MARKHAM*..... 238

— *The granting of a license to have an exhibition in the city of New York is discretionary with the mayor.*

See *PEOPLE EX REL. WORTH v. GRANT*..... 455

— *What is not an omission to perform his duty by a public officer within the meaning of section 154 of the Penal Code.*

See *PEOPLE v. RYALL*..... 235

MURDER — *Record of acquittal of one of two parties indicted for murder — admissibility of it on the trial of the other conspirator.*

See *PEOPLE v. KIEF*..... 337

NEGLIGENCE — *Proof as to the absence of contributory negligence — from what facts the taking of proper precautions may be presumed.]* 1. In an action brought by a wife to recover the damages resulting from the death of her husband upon the defendant's railroad, it appeared that the wife, her husband and a friend, were walking on a sidewalk, across which ran the tracks of the railroad company, the wife being about three feet behind her husband and his friend; that the plaintiff, as they approached the tracks, watched for a train passing up or down; that she looked both ways, saw no light or car coming, heard no noise, saw no flagman, heard no one call to them, and did not hear any bell or whistle; that the two men stepped upon the tracks of the defendant's railroad and were struck by the rear end of a tender attached to a locomotive which was being backed along the track, and were both killed.

The evidence offered by the defendant, the Railroad Company, tended to show that proper signals were given as the engine and tender approached the crossing; that the persons killed were trespassing upon the defendant's tracks, and that they were warned and urged not to cross by the flagman, but his warnings were unheeded, while the evidence on the part of the plaintiff tended to show the reverse.

At the close of the evidence the defendant's counsel asked the court to direct a verdict for the defendant upon the ground, among others, that there was no proof of want of contributory negligence on the part of the deceased.

Hold, that the motion was properly denied; that if the jury found, as they might, that the plaintiff's evidence was true, they might fairly assume that her husband took the same precautions as the plaintiff, and made the same observations as she did. *WIWIROWSKI v. LAKE SHORE AND M. S. R. Co.*..... 40

2. — *Town highway out of repair.]* In an action brought against a town to recover the damages alleged to have been sustained by the plaintiff through the negligence of the commissioner of highways thereof, evidence as to the statements made by the commissioner, on the day following the accident, that he supposed the road had been repaired, and that he had ordered a man to make such repairs at two different times, is incompetent.

STONE v. TOWN OF POLAND..... 21

3. — *Acts and declarations of the highway commissioners subsequent to the accident, how far evidence against the town — evidence as to the subsequent repair of the highway.]* While the act, declaration or omission of duty of a party to a suit, whether before or after the event, may be given in evidence against him, yet where liability against a town is sought to be established by reason of the negligent omission of the commissioner of highways thereof, the declarations of the latter, when made after the injuries have been received, are not competent evidence.

While, in such an action, evidence of repairs having been made shortly after the accident may not be competent, if offered for the purpose of show-

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ing that the party charged with negligence must have known before the accident of the dangerous character of the locality, yet such rule does not prevent a witness from describing the condition of the place where the accident has happened, although it may incidentally and argumentatively involve the fact that the party charged with maintaining the road has, since the accident, made repairs thereon; and evidence of the condition of the highway, from a witness inspecting it after the accident, may be proper to show the presence of funds in the hands of the highway commissioners at the time of the accident. *Id.*

4. — *Loss of money and chattels from his berth by a passenger, through the negligence of a steamboat company.*] A passenger on a steamboat retired for the night to his berth, where he had with him seventy-three dollars in bills, a gold watch worth sixty or seventy dollars; a gold pen and pencil worth three dollars; railroad tickets for which he paid six or seven dollars, and a silver watch whose value was unknown. These articles he placed in his vest, which was put under his pillow, and when he awoke in the morning the vest and these articles had been stolen.

In an action brought to recover their value from the steamboat company, it was charged that the loss had arisen through the negligence of the persons in charge of the steamer.

The court charged the jury that if they found that it was a negligent act for the passenger to have this amount of money in his berth under the circumstances, instead of giving it to the employees of the company to take care of, that the defendant was entitled to a verdict.

Held, that this charge was erroneous; that even if it was negligence for the plaintiff to have this money in his berth, it in no degree contributed to the loss of the other articles which he had in his vest, nor did it affect his right to recover their value. *DUNN v. NEW HAVEN STEAMBOAT CO.* 461

5. — *Charge of the court in reference to the plaintiff's negligence.*] The court also charged that the plaintiff had a right to carry these things with him on his trip, but not to retain them in his berth.

Held, that under this charge the jury might have inferred that the plaintiff had no cause of action because of his having taken these articles into his berth, and that the charge was erroneous. *Id.*

6. — *Of a child in whose charge a younger sister is at the time of an accident to the latter — how far it bars the recovery of damages.*] In an action brought to recover damages arising from the negligent killing of an infant four years and nine months of age, it appeared that the defendant had a life interest and was in possession of certain premises in Harlem, the only means of access to the privy connected with which was by going out through a door in the second floor to a shed, and from the shed to the yard, by a stairway; that the mother of the deceased had placed her in charge of her sister, who was nine years of age, and who went with the deceased down into the back-yard and then came up the steps. The deceased was behind her sister, who went into the house when the former was two steps from the top of the stairway. The sister returned at once from the house and found that the deceased had fallen down the steps and was killed.

The defendant's counsel asked the court to charge that if the mother selected an older child to accompany the deceased upon the occasion in question, and the one so selected was negligent in caring for the deceased, the plaintiff could not recover, which the court declined to do.

Held, that the court erred in refusing to so charge.

That the deceased was evidently placed in charge of her sister, and the care taken of her by the latter was a proper subject of inquiry, and the question in regard to the negligence of the sister should have been submitted to the jury as requested. *WILLIAMS v. GARDINER* 508

7. — *When a question for the jury.*] In an action brought to recover damages alleged to have resulted to the plaintiff, who was employed on a scow which received mud from a dredging machine owned by the defendants, it appeared that after the plaintiff had been at work a few days for the defendants, one Delamater, the captain in charge of the dredging machine, swung the bucket over and struck a shaft which the plaintiff was turning with a wrench, as a result of which the plaintiff was seriously injured. The evidence tended to establish the fact that the captain was drunk at the time; that the

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plaintiff had seen him drunk on three occasions during his employment of eight days; that the captain always ran the dredging machine, and that the plaintiff did not tell the defendants of the fact that the captain was addicted to drink, nor did he leave their employment on that account.

No direct proof was given that the defendants knew of the habits of Delamater, although it appeared that the defendants' superintendent was at Weehawken where the dredge was at work every other day, and was there on the day on which the accident happened.

Held, that it was a question for the jury, under the circumstances of this case, whether the defendants or their superintendent had knowledge of the habits of Delamater, and also whether the plaintiff was guilty of omissions which precluded his recovery. *TONNESON v. SANFORD* 415

8. — *Effect of payment of money to the father of an injured minor and the execution of a release by the minor.*] In an action to recover damages resulting from a personal injury received by the plaintiff through the alleged negligence of the defendants, it appeared that when the injuries were received by the plaintiff he was under twenty-one years of age, and that the defendants paid to his father the sum of \$100, and a paper was thereupon executed by the plaintiff purporting to be a release of all claims against the defendants by reason of the injuries to the plaintiff.

Held, that the payment of the money to the father was not a bar to the right of the plaintiff to recover damages in this action.

That, in such an action, evidence of the amount of wages which the plaintiff is earning is admissible upon the question of damages. *PALMER v. CONANT*.. 333

9. — *Damage from blasting — negligence need not be shown.*] In an action brought to recover for the damages which resulted to the plaintiff's dwelling by reason of the blasting of rocks at Hell Gate in the East river, at or near Long Island City, by the defendant while acting under a contract with the United States, the court charged the jury that the defendant was responsible for such injury, if it caused it, and refused to charge that to make the defendant liable it must appear that the work was done in a negligent manner.

Held, that the charge was correct. *BENNER v. ATLANTIC DREDGING CO.* 359

— *An administrator who negotiates a sale of the real estate of his intestate, conveyed by the deed of the heirs, is liable for the money received by him therefor, and deposited in a bank which fails.*

See *HARLOW v. MILLS*..... 391

— *Master and servant — sub-contractor, of one contracting with a city to do the entire work — the city is not liable for his negligence — proof of damage resulting from loss of time*

See *WOOD v. CITY OF WATERTOWN* 298

— *Railroad company — liability of, for the death of a passenger passing from one car to another while the cars were in motion.*

See *COSTIKYAN v. ROME, W. AND O. R. R. CO.*..... 590

— *Railroad crossing where the view is obstructed — contributory negligence of one crossing the tracks — absence of flagman.*

See *WHALEN v. N. Y. C. AND H. R. R. R. CO.*..... 431

— *Employee, injured by the fall of an elevator — when the employer is not liable because of their having been no safety clutch on it.*

See *HANSEN v. SCHNEIDER* 60

— *Mistake of a bank cashier in certifying negotiable paper as good — when the amount paid by the bank under such certification is recoverable by it.*

See *NAT. PARK BANK v. STEELE & JOHNSON MFG. CO.*..... 81

— *Employment of a boy under thirteen years of age — not alone and of itself evidence of negligence.*

See *WHITE v. WITTEMAN LITHOGRAPHIC CO.*..... 381

— *Gate in a fence inclosing a railroad company's tracks — the company is not bound to keep it shut.*

See *DIAMOND BRICK CO. v. N. Y. C. AND H. R. R. R. CO.*..... 396

— *Use of a steam winch by a seaman — contributory negligence.*

See *ELDRIDGE v. ATLAS STEAMSHIP CO.*..... 96

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- *Horse railroad — injury to one crossing its tracks — contributory negligence.*
See WELLS v. BROOKLYN CITY R. R. Co. 389
- *Bridge railing — giving way when leaned against — liability of the city to the party injured.*
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- *Fire-escapes in a manufactory — duty of the owner to erect them, without notice from the commissioner.*
See McLAUGHLIN v. ARMFIELD 376
- *Duty of an employer defined.*
See KELLEY v. FORTY-SECOND ST. RY. Co. 98

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See BILLS AND NOTES.

- NEW TRIAL — Costs payable as a condition of granting a new trial — where a verdict is set aside as against evidence.**
See BUCK v. WEBB. 185
- *Appeal from an order denying a motion for a new trial, unnecessary in a criminal action — misconduct on the part of the jury requiring that a new trial be granted.*
See PEOPLE v. SCHAD. 571

NEW YORK CITY — *The granting of a license to have an exhibition in the city of New York is discretionary with the mayor.] Under section 1998 of chapter 410 of the Laws of 1882, providing that an exhibition shall not take place in the city of New York until “a license for the place of such exhibition, for such purpose, shall have been first had and obtained,” and section 1999 providing that “the mayor of the city of New York is hereby authorized and empowered to grant such license, to continue in force until the first day of May next ensuing the grant thereof, on receiving for each license so granted, and before the issuing thereof, the sum of five hundred dollars,” it is discretionary with the mayor whether he will grant a license or not.*

The court cannot be called upon to substitute its judgment for that of the mayor on an application for a mandamus to compel the latter to grant the license. PEOPLE EX REL. WORTH v. GRANT 455

- *Duty of the Comptroller of the city of New York to issue revenue bonds to pay the proportion of the State tax chargeable to that city — no deduction is proper, of the tax on the amount added to the assessed valuation by the State Board of Equalization, nor of the amount raised in the State tax levy and not appropriated, nor of the amount of a deficiency in the city tax levy to meet such bonds.*
See MATTER OF ATTORNEY-GENERAL 218
- *Assessment for street pavement under section 878 of chapter 410 of 1882 — a horse railroad company should be assessed for such work.*
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- *Removal of a clerk in the New York police department — no trial necessary — notice to the clerk of the charge is required.*
See PEOPLE EX REL. BRANT v. MACLEAN 152

NEW YORK HOSPITAL — Exemption from taxation.
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NOTICE — An agreement, terminable by ten days' notice, continues in force for ten days after such notice is given — default therein — waiver
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- *Service of a notice on an attorney through a slot in his office door*
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- *Board of health — power of, to direct the abatement of a nuisance, without giving notice to the party charged with maintaining it.*
See PEOPLE v. BOARD OF HEALTH 595
- *Agreement to pay on the sale of a vessel and to give notice of the sale — when the statute of limitations begins to run.*
See HALL v. ROBERTS 539
- *Principal and agent — what disclosures required of an agent acting for both parties to a bargain.*
See FRANKEL v. WATHEN 543
- *Lis pendens, when canceled by order of the court — notice.*
See VALENTINE v. AUSTIN 398

NUISANCE — *Railroad company — right of, to run trains on any of its tracks, although the track used is immediately adjoining a dwelling-house and its use is peculiarly prejudicial thereto.*

See FLINN v. N. Y. C. AND H. R. R. R. Co. 230

— *Board of health — power of, to direct the abatement of a nuisance without giving notice to the party charged with maintaining it.*

See PEOPLE v. BOARD OF HEALTH 595

OFFENSES:

See CRIMES.

OFFICERS — *Public officer — acting under an unconstitutional statute — liability of, to an individual damaged.]* Where the superintendent of public works makes a contract for the dredging and excavating of the channel of a river, which is a public highway, in accordance with the provisions of an unconstitutional statute, he is properly made a party defendant individually, in an action, brought by a person whose rights are affected by such work, to restrain the execution thereof and for damages.

In such case, as the act under which the superintendent makes the contract is unconstitutional and void, the superintendent cannot invoke its protection in defense of his action in contracting for and making the improvements contemplated thereby to the prejudice of the plaintiff.

In such case the superintendent is acting outside of his official authority, and his official position affords him no protection in so doing.

WATERLOO WOOLEN MFG. CO. v. SHANAHAN 50

— *What is not an omission to perform his duty by a public officer within the meaning of section 154 of the Penal Code.*

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— *Of corporations.*

See CORPORATIONS.

OFFSET.

See SET-OFF.

OPENING — Of a case

See TRIAL.

ORDINANCES — Of municipalities — construction, etc., of.

See MUNICIPAL CORPORATIONS.

OVERSEER OF THE POOR:

See POOR.

PARTIES — *Defect of parties defendant.]* In an action brought by a judgment-creditor to set aside certain conveyances made by a limited copartnership to a corporation, and to have a certain mortgage, which had been executed

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by the corporation to the Farmers' Loan and Trust Company, as trustee, adjudged fraudulent, it appeared that the transfer and mortgage thus attacked were made under an agreement between the limited copartnership and a corporation, and one of the members of the copartnership, individually, and certain creditors of such parties, and three trustees, by which it was provided that a new corporation, to be known as the David G. Yuengling, Jr., Brewing Company, should be organized, to which the property of the limited copartnership, and of the individual member thereof, should be transferred, in consideration of which it should assume payment of all indebtedness owing to the creditors of the firm, and of the individual member thereof, and of the New York and Staten Island Brewing Company, who should sign such agreement.

The complaint alleged that the agreement was carried out, but that the conveyances and transfers thereunder were made by the copartnership and the individual member thereof, and were accepted by the David G. Yuengling, Jr., Brewing Company with the intent and for the purpose of hindering, delaying and defrauding their creditors.

Neither the New York and Staten Island Brewing Company, nor any of the creditors who signed the agreement, were made parties to the action, to the complaint in which the defendant Yuengling demurred on the ground that they were necessary parties to the action.

Held, that the demurrer should be sustained.

That as the complaint attacked not merely the conveyances and transfers of the judgment-debtor's property, which were made pursuant to the agreement, but assailed the agreement itself, and further alleged that all the parties to the agreement had notice at the time it was executed of the intention to hinder, delay and defraud creditors, and asked that the said agreement be declared null and void as against the plaintiff, that the court could not properly adjudicate that the New York and Staten Island Brewing Company, and the creditors signing this agreement, entered into the same knowing it to be fraudulent without affording them an opportunity to be heard on that subject.

That these creditors were not represented in this respect by the Farmers' Loan and Trust Company, which was made a party defendant to the action, as that corporation was not a trustee for these creditors as to any rights they had acquired directly under the agreement, nor the representative of the creditors in entering into the agreement.

NATIONAL BROADWAY BK. *v.* YUENGLING..... 474

— *Costs — against an assignee of the cause of action — sureties upon an undertaking, who prosecute the action brought by their principal, are not liable for the costs — remedy of the defendant.*

See METROPOLITAN CONCERT CO. *v.* SPERRY..... 470

— *Action for penalties under the laws to protect fish (§§ 23, 24, chap. 534 of 1879; chap. 127 of 1884 and chap. 11 of 1886) — the authority of the proper officer must appear.*

See PEOPLE *v.* BELKNAP..... 241

— *Examination of, before trial.*

See DEPOSITION.

PARTITION — *Distribution of unclaimed proceeds of sale in partition suits — Code of Civil Procedure, §§ 1582, 841 — chapters 39 and 40 of 1889 are constitutional.] Sections 1582 and 841 of the Code of Civil Procedure, as amended, respectively, by chapters 39 and 40 of the Laws of 1889, relating to the distribution of unclaimed moneys arising from the proceeds of sale of real property in actions of partition in certain cases, are not in violation of the constitutional provision which prohibits the deprivation of persons of their property without due process of law. They simply establish a new rule of evidence, the creation of which is within the authority of the legislature.*

Semble, that if these laws made the lapse of time conclusive evidence of the death of the unknown heirs, and precluded them from establishing the truth of their existence, the laws could not be upheld as a legitimate exercise of legislative power because they might destroy rights and work a confiscation of property; that as they simply shifted the burden of proof in the proceedings to obtain a fund in the hands of the county treasurer, they operate upon the remedy merely, and not upon a vested right.

PEOPLE EX REL MILLER *v.* RYDER 407

PARTNERSHIP — *Liability of a firm, which continues after the death of one of its members to use the securities of such member in its business.*] 1. A testator left his estate in trust to certain trustees, one of whom was his partner in business. Upon the death of the testator a new firm was formed and all the accounts of the old firm were charged to the new firm, which continued to carry on the business theretofore transacted by the firm of which the testator was a partner.

The personal estate of the testator was represented by stocks and securities held and carried for customers by the firm of which he had been a member, which stocks and securities passed into the control of the new firm and were afterwards mainly employed in carrying on the business transacted by it, of dealing in stocks and securities. A large amount of money held by the firm was deposited in a trust company, which paid two per cent interest on the deposit, which deposit, however, was subsidiary to the business of the new firm.

Held, that the new firm was properly charged with interest upon such assets of the estate of the testator at the rate of six per cent per annum.

That as all the partners of the new firm were aware of the fact of this use of the trust estate, or if they were not aware of it, were chargeable with the duty of ascertaining the use so being made of it, and neglected to perform their duty, that they were all obligated to pay the interest, and that such obligation was not satisfied by the payment of the two per cent interest received upon the deposit in the trust company **MATTER OF MYERS**..... 178

2. — *Limited partnership — money paid in by special partners by a check, not cashed when the affidavit and certificate were made — liability of the special partners*] Where an affidavit and a certificate, made under section 8 of title 1 of chapter 4 of part 2 of the Revised Statutes (1 R. S., 765), relating to limited partnerships, states that \$10,000 contributed by two special partners, named therein, to the common stock, has been actually and in good faith paid in cash, and it appears that, in fact, no cash payment had been made by the special partners at the time the affidavit was verified, but a check for \$10,000 had been drawn on that day by such special partners, which was certified on the following day, and was deposited to the credit of the partnership on the next day thereafter, on the afternoon of which latter day the certificate and affidavit were filed and recorded in the proper county clerk's office, and that the next day the check was paid in due course of business to the bank in which it had been deposited.

Held, that the special partners were liable for the debts of the partnership

That the truth of the affidavit was to be determined at the date at which it was sworn to, and not as of the date at which it was filed in the county clerk's office, and that the affidavit was, therefore, false. **WHITE v. EISEMAN**, 484

3. — *Special partner — the turning over of notes to the limited partnership is not a payment in cash of special capital.*] In an action brought to charge a special partner with a liability of the firm, because of the alleged falsity of the statement, required by the statute, that the capital contributed by him had been paid in cash, it appeared that before the special partnership was formed there had been in existence a partnership of a like character, in which the present defendant was not a partner, but to which he had loaned money, to secure the repayment of which he had taken the notes of that partnership for the sum of \$20,000. These notes he contributed, as special capital to that amount, to the special partnership.

Held, that the transaction showed that the sum which the defendant purported to have contributed towards the special partnership had not been paid in cash, and that he was liable for the debts of the firm as a general partner.

KOHLER v. LINDENMEYER..... 518

4. — *Competency of partnership books as evidence.*] In order to establish the fact of the notes of the old firm having been given to the defendant, the books of the old firm were admitted in evidence for that purpose.

Held, that the books of the old firm were properly admitted in evidence.

Also that entries in the books of the special partnership were competent as against the defendant, who was a special member thereof. *Id.*

— *General assignment — a preference, payable out of firm assets, of money advanced, after the dissolution of the firm, to the surviving partner, for the purpose of paying firm debts, is illegal.*

See **DURANT v. PIERSON**..... 190

PASSENGER — *On railroad.*

See RAILROAD.

— *By boat.*

See SHIPPING.

PAUPER:

See POOR.

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PAYMENT — *Interest on a bond and mortgage — voluntary payment.]* 1. In an action brought for the foreclosure of a mortgage, which provided that it was "intended as security for the payment of the sum of twelve hundred dollars in one year after the date hereof, with interest thereon at the rate of seven per cent per annum, to be paid half-yearly on the first days of January and July in each year, and also at the time the principal shall be paid," it appeared that, up to January, 1889, interest had been paid thereon at the rate of seven per cent per annum.

Held, that such payments of interest, in excess of the amount legally collectible, having been voluntarily made with a full knowledge of the facts, that the owner of the mortgaged premises was not entitled to have the excess thereof, over and above legal interest, applied on the principal of the debt.

WILCOX v. VAN VOORHIS 575

2. — *At what rate chargeable.]* That, by the terms of the bond and mortgage in this case, the plaintiff was entitled to collect interest, at the rate of seven per cent per annum, down to the time of actual payment, or until the contract was merged in a judgment. *Id.*

— *Limited partnership — money paid in by special partners by a check, not cashed when the affidavit and certificate were made — liability of the special partners.*

See WHITE v. EISEMAN 484

— *Effect of payment of money to the father of an injured minor and the execution of a release by the minor.*

See PALMER v. CONANT 333

— *Special partner — the turning over of notes to the limited partnership is not a payment in cash of special capital — competency of partnership books as evidence.*

See KOHLER v. LINDENMEYER 513

— *Made after proceedings to vacate an assessment are commenced, does not affect the right of the applicant to relief from such assessment.*

See MATTER OF HAZLETON 112

— *The possession of a bond and mortgage by the agent effecting the loan — confers no authority to receive the principal thereof, before it becomes due.*

See SCHERMERHORN v. FARLEY 66

PENAL CODE — § 154 — *What is not an omission to perform his duty by a public officer within the meaning of section 154 of the Penal Code.*

See PEOPLE v. RYALL 235

[See table of sections of the Penal Code cited, *ante*, in this volume.]

PENALTIES — *Common carrier — discrimination in its rates between different customers — a complaint, based upon a penal statute of another State, will not be sustained in the State of New York — common-law right.*

See LANGDON v. N. Y., L. E. AND W. R. R. Co. 123

See CRIMES.

LICENSES.

PENSION — *Supreme Court justice — the pension on his reaching the age of seventy years is not conditional on his having served ten years of the abridged term.*

See PEOPLE EX REL. GILBERT v. WEMPLE 275

PERFORMANCE — *Of contracts.*

See CONTRACTS.

PERSONAL PROPERTY — *Will — equitable conversion of real estate into personalty.*

See FRASER v. McNAUGHTON..... 80

— *Sales of.*

See SALES.

PERSONAL TRANSACTIONS — *With a deceased or insane person.*

See EVIDENCE.

PETIT LARCENY — *Evidence — trial for petit larceny — proof of similar transactions having taken place elsewhere.*

See PEOPLE v. WILLIAMS..... 284

PHYSICIAN — *Insurance — statement, in the application for a life policy, of the name of the last physician attending the applicant — when a party making use of an affidavit is not estopped to deny its truthfulness.*

See HELWIG v. MUT. LIFE INS. CO...... 366

— *Cannot testify on whom he relied for payment of his services.*

See POPE v. MCGILL..... 294

PLACE OF TRIAL:

See VENUE.

PLEADINGS — *General denial — in an action on contract proof may be given under a general denial, that it was a wager contract.]* 1. In an action to recover upon an account for money laid out and expended, and for commissions earned in the purchase and sale of wheat and coffee by the plaintiffs, as the agents of the defendant, the defendant interposed a general denial. Upon the cross-examination of one of the plaintiffs' witnesses, who had conducted the transactions out of which the alleged indebtedness arose, the defendant attempted to prove that it was the understanding of the parties, at the time that all orders were given for the purchases in question, that no merchandise whatever was to be delivered, but that the purchases and sales were to be settled for upon the basis of the differences in the market-prices. This evidence was objected to upon the ground that it was incompetent, irrelevant and immaterial and was excluded.

Held, that the defendant had a right, under a general denial, to prove anything tending to show that no valid contract was ever entered into, and, therefore, was entitled, in the case in question, to show that the purchases and sales were mere wager contracts and consequently illegal, and that the evidence was, therefore, improperly rejected. *HENTZ v. MINER*..... 428

2. — *An answer that the defendant "signed a paper substantially of the tenor and effect set forth in said complaint," followed by a denial of knowledge or information "whether the same was duly signed and executed," admits the execution and sealing of the paper.]* In an action to recover upon a bond the complaint alleged that the defendants duly signed, executed and delivered their certain bond, or written obligation, to the plaintiff. The answer of one of the defendants alleged "that on or about the 28th day of January, 1886, this defendant signed a paper substantially of the tenor and effect set forth in said complaint, and left the same with one James W. Wheaton, but this defendant has no knowledge or information sufficient to form a belief as to whether the same was duly signed and executed by the defendants, or whether the same was duly delivered to the plaintiff as alleged in said complaint."

Held, that, under the pleadings, this defendant was not at liberty to give evidence to show that he had not executed the bond, or that it had not been sealed by him. *COMMERCIAL UNION ASSURANCE CO. v. BAUER*..... 68

3. — *Order that an answer be made more definite and certain — granted where the complaint alleges, generally, false representations to have been made by agents of a corporate plaintiff.]* In an action brought by a corporation to recover upon a policy of insurance against fire, the answer alleged that an agreement, mentioned in the complaint, fixing the amount of the loss, was entered into by the defendant on the strength of and in reliance on false and fraudulent representations upon the part of the plaintiff as to the amount of

PLEADINGS — Continued.

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the loss, and that false and fraudulent statements had been made by the plaintiff and its authorized agents to the defendant and its authorized agents.

Held, that the plaintiff was entitled to an order to have the answer made more definite and certain.

Whatever the rule may be as between individuals in this regard, where one of the parties is a corporation and acts by its trustees, officers and agents, such relief will be granted, as such a plaintiff cannot be expected to have in court every agent, officer and trustee upon the trial of any case in which an allegation of fraud may have been asserted.

TEXAS, ETC., OIL CO. v. MUT. FIRE INS. CO. 560

— *Examination of a party before trial, to enable the plaintiff to amend his complaint — it will not be ordered unless the party be first applied to, to furnish the information voluntarily.*

See SHERMAN v. BEACON CONSTRUCTION CO. 148

— *Foreclosure of a purchase-money mortgage — answer setting up a breach of a covenant of seizin in the deed given by the mortgagee.*

See MERRITT v. GOULEY. 372

— *Examination of a party before trial — when proper to enable plaintiff to frame his complaint.*

See HAYNES v. CREIGHTON 140

— *Denial of knowledge as to incorporation.*

See VULCAN v. MYERS. 161

POLICE — Policeman — when tried entitled to counsel.] A policeman, tried upon charges before a board of police commissioners, is entitled to have counsel. PEOPLE EX REL VAN HISE v. POLICE COMMISSIONERS. 224

— *Removal of a clerk in the New York police department — no trial is necessary — notice to the clerk of the charge is required.*

See PEOPLE EX REL. BRANT v. MACLEAN. 152

POLICY — Of insurance.

See INSURANCE.

POOR — Overseer of the poor in Montgomery county — the sole judge as to who are paupers.] 1. In an action brought against the overseer of the poor of the town of Amsterdam to recover the value of services, rendered by his direction, in the care of a transient pauper, it appeared that the overseer of the poor employed the plaintiff's assignors to nurse one Murphy, which they did, and thereafter gave them orders on the town board in payment for such services; that these orders had been presented to the town board of auditors, and had been disallowed by that board on the ground that they were not proper charges against the town, whereupon the court directed a verdict for the defendant.

Held, that the overseers of the towns in the county of Montgomery, under section 3 of chapter 42 of the Laws of 1863, were the sole and exclusive judges as to who were paupers of their towns, and should be relieved by them, and that the exercise of that power could not be reviewed collaterally either in the Supreme Court or by the town auditors. CHRISTMAN v. PHILLIPS 282

2. — *Audit by town auditors, at what time proper.]* *Semble*, that the town auditors had no authority to examine and adjudicate upon the accounts of the overseers of the poor at any other meeting than that held on the last Tuesday preceding the annual town meeting of their town under section 1 of chapter 172 of the Laws of 1863. *Id.*

3. — *Evidence.]* By chapter 3 of said act it is made the duty of the town board of auditors to make a statement of such accounts and append thereto a certificate, to be signed by a majority of the board, showing the state of the accounts of said officers to the date of the certificate, which statement and certificate are to be filed in the town clerk's office.

Semble, that before parol evidence could be given as to what took place at such meeting, the absence of the statement and certificate should be accounted for in such manner as to let in secondary evidence of its contents. *Id.*

POSSESSION — *Delivery of trust deeds — presumed from their acceptance by the trustee and recording, though afterwards found in the grantor's possession — when not void as made in contemplation of marriage — effect of subsequent representations and possession of the property by the grantor.*

See *BLISS v. WEST*..... 71

— *The possession of a bond and mortgage by the agent effecting the loan — confers no authority to receive the principal thereof before it becomes due.*

See *SCHERMERHORN v. FARLEY*..... 66

PRACTICE — *Service of a notice on an attorney through a slot in his office door.*] 1. The service of a notice of appeal was attempted to be made upon the adverse attorney by sliding the same through a slot in the center of his office door, which was surmounted with a brass plate with the word "Letters" upon it. The notice was not inclosed in a sealed wrapper directed to the attorney.

Held, that the service was ineffectual.

In order that a service may be made, under the provision authorizing the leaving of the paper in a conspicuous place in the office, it is necessary that access to the office should have been first attained, and where the office is closed the service must be made by depositing the paper in a sealed wrapper, directed to the attorney, in his office letter-box, or at his place of residence, by leaving it with a person of suitable age and discretion, or by a service upon the attorney himself personally. *LIVINGSTON v. N. Y. EL R. R. Co.* 181

2. — *Lis pendens — when canceled by order of the court — notice.*] Where a notice of *lis pendens*, filed in the county clerk's office in a pending action, has been canceled by an order of the court, a party examining the title to real property described therein is not bound to examine the complaint in the action, or to take notice of what such an examination would disclose.

When a *lis pendens* is canceled by an order of the court it ceases to be notice to any one. *VALENTINE v. AUSTIN*..... 398

— *Order that an answer be made more definite and certain — granted where the complaint alleges, generally, false representations to have been made by agents of a corporate plaintiff.*

See *TEXAS, ETC., OIL CO. v. MUT. FIRE INS. CO.*..... 560

— *Change of venue — not prohibited in an action for penalties under the game law, chapter 577 of 1888.*

See *PEOPLE v. COUGHTRY*..... 245

— *Action for penalties under the laws to protect fish — §§ 23, 24, chap. 534 of 1879, chap. 127 of 1884; chap. 11 of 1886 — the authority of the proper officer must appear.*

See *PEOPLE v. BELKNAP*..... 241

— *Return to a writ of certiorari — part of it cannot be stricken out as irrelevant — if incomplete, a further return may be ordered.*

See *PEOPLE EX REL. HIGGINS v. GRANT*..... 158

— *A plaintiff avoiding service of an order — will not be heard on a motion to vacate it.*

See *DUDLEY v. PRESS PUBLISHING Co*..... 181

— *The admission of improper evidence in an equity case — not a ground for the reversal of the judgment.*

See *McSORLEY v. HUGHES*..... 360

— *Affidavit for the examination of a party before trial — when the plaintiff must make it himself.*

See *SIMMONS v. HAZARD*..... 119

— *Actor agreeing to render exclusive service to one — when restrained by injunction from acting for another.*

See *CARTER v. FERGUSON*..... 569

— *Stipulation extending the time in which an appeal may be taken.*

See *BAGLEY v. JENNINGS*..... 56

— *Exception to a charge to the jury when bringing in a sealed verdict.*

See *PANAMA R. R. Co. v. JOHNSON*..... 557

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- *Right to withdraw a counter-claim upon a trial before a referee.*
See BROWN v. BUTLER..... 511
- *Stipulating as to objections.*
See GREER v. GREER..... 251
- *Defect of parties defendant.*
See NATIONAL BROADWAY BK. v. YUENGLING..... 474
- *As to making a case and exceptions on appeal*
See APPEAL.
- *In regard to the review of adjudications.*
See APPEAL.
- *Relating to attachments.*
See ATTACHMENTS.
- *As to allowance and recovery of costs.*
See COSTS.
- *Relating to the examination of a party before trial.*
See DEPOSITION.
- *Relating to injunctions.*
See INJUNCTION.
- *Relating to pleadings.*
See PLEADINGS.
- *Relating to the trial of actions.*
See TRIAL.
- *Relating to the probate, etc., of wills.*
See WILL.

PREFERENCES — *In a general assignment.*
See ASSIGNMENTS.

PRESBYTERIAN CHURCH — *The Board of Foreign Missions and Board of Home Missions of the Presbyterian Church are not exempt from the collateral inheritance tax.*

See MATTER OF BOARD OF FOREIGN MISSIONS..... 116

PRESUMPTION:
See EVIDENCE.

PRINCIPAL AND AGENT — *Commissions of an agent — account stated.]*

1. In an action brought to recover commissions alleged to have been earned by the sale of whiskies, it appeared that the plaintiff, while acting as the general agent of the defendants in the sale of whiskies, was requested by the firm of Cook & Bernheimer to negotiate the exchange of a clay farm, owned by them, for whiskies. The plaintiff called the attention of the defendants to the farm, and an exchange was finally effected through his agency. The whisky was thereupon delivered and the defendants agreed to allow the plaintiff \$1,000 for his commissions in this transaction, which amount was charged on the plaintiff's books to the defendants' firm, and was included in an account rendered by him, which was received without objection by the defendants, and the amount thereof paid to the plaintiff by a remittance made prior to November 1, 1886.

It appeared that the plaintiff had also obtained a commission of \$250 from Cook & Bernheimer for selling the farm, a fact which he had concealed from the defendants.

Held, that although an account stated is *prima facie* evidence, and will be deemed conclusive evidence of its correctness, between the parties, unless some fraud, mistake, omission or inaccuracy is shown, yet the converse of the rule is equally well established, namely, that if fraud be shown, the account loses its conclusive character and is subject to re-examination.

FRANKEL v. WATHEN..... 543

2. — *What disclosure required of an agent acting for both the parties to a bargain.]* Where an agent is acting in a double capacity, representing two

PRINCIPAL AND AGENT — Continued.

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persons, for each of whom he is expected to do his best, a knowledge by the principals of his duplicate character should be established, not by mere inference, but by evidence of a full disclosure or positive proof of knowledge, so that the seller or the buyer, as the case may be, may be advised of the exact relation of the agent to the other parties to the negotiations. *Id.*

3. — *When the minds of a principal and agent do not meet as to the latter's commissions.]* Where a principal authorizes his agent, by letter, to sell certain property on condition that he waits for a time for his commissions, and the agent writes to his principal refusing to wait for his commissions, and the sale is made, the principal may enforce the condition as to the time of payment of the commissions. *Id.*

4. — *The possession of a bond and mortgage by the agent effecting the loan—confers no authority to receive the principal secured thereby, before it becomes due.]* In an action brought for the foreclosure of a mortgage it appeared that the money secured thereby had been loaned for the plaintiff, through the agency of a firm of attorneys, with which the bond and mortgage had been left by the plaintiff. The firm intrusted the business to the immediate control of a clerk, to whom the interest on the debt was from time to time paid, and was by him indorsed upon the bond, which, with the mortgage, was accessible to him, and to whom it was claimed by the defendants that the principal sum secured by the mortgage had been paid. This payment of the principal was made before the same, by the terms of the bond and mortgage, became due.

Upon the trial evidence was offered to show such payment of the principal, which was rejected, although the defendants proved that the bond and mortgage had been surrendered by the clerk, with a discharge purporting to be subscribed with the name of the plaintiff, the execution of which had been proved by the clerk as a subscribing witness, and that this discharge had been filed with the register and the mortgage discharged of record. It appeared, however, that the plaintiff had not signed such discharge.

Held, that the payments of the principal, which took place prior to the time that the principal sum secured by the mortgage became due, were not good as against the plaintiff, as no authority had been conferred by him, either upon the firm or upon its clerk, to anticipate the day of payment by receiving any part of the principal sum before it became due.

That possession of the bond and mortgage, in the absence of any other actual authority, conferred no power to collect or receive the money before it became due.

That the plaintiff was entitled to enforce payment of the bond and mortgage.

SCHERMERHORN v. FARLEY..... 66

— *Action for an account of the management and sales of land in another State—when it is not necessary to allege that the defendant has money belonging to the plaintiff—jurisdiction of the courts of the State of New York.*

See READING v. HAGGIN..... 450

— *An administrator who negotiates a sale of the real estate of his intestate, conveyed by the deed of the heirs, is liable for the money received by him therefor and deposited in a bank which fails.*

See HARLOW v. MILLS..... 391

— *Vicious dog—an employer is not liable for the acts of one kept by his employee on the former's land.*

See SIMPSON v. GRIGGS..... 898

See MASTER AND SERVANT.

— *Liability for negligence.*

See NEGLIGENCE.

PRINCIPAL AND INTEREST — Interest on a bond and mortgage—at what rate chargeable—voluntary payment.

See WILCOX v. VAN VOORHIS..... 575

PRINCIPAL AND SURETY — Costs—against an assignee of the cause of action—sureties upon an undertaking, who prosecute the action brought by their principal, are not liable for the costs—remedy of the defendant.

See METROPOLITAN CONCERT CO. v. SPERRY... 470

PRINCIPAL AND SURETY — Continued.

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— *Bail bond, not naming the offense — not enforceable.*

See PEOPLE v. GILLMAN..... 368

PRIVILEGED COMMUNICATIONS — In general.

See EVIDENCE.

PROBATE — Of a will.

See SURROGATE.

PROCEDURE.

See PRACTICE.

PROMISSORY NOTE:

See BILLS AND NOTES.

PROOFS OF LOSS — Under insurance policies.

See INSURANCE.

PROPERTY :

See REAL PROPERTY.

PUBLICATION — Of a will.

See WILL.

PUBLIC OFFICERS :

See OFFICERS.

PUBLIC STREETS :

See MUNICIPAL CORPORATIONS.

PUBLIC USE :

See EMINENT DOMAIN.

PURCHASE — Of personal property.

See SALES.

— *Of real property.*

See VENDOR AND PURCHASER.

RAILROAD — *Executors and trustees may recover the damage caused to property by an elevated railroad, as well that caused before as that arising after their testator's death.] 1. In an action brought to restrain the operation of an elevated railroad by the executors and trustees under the will of a deceased owner of property abutting upon the street through which said railroad runs, the plaintiffs are entitled to recover such damages as resulted from the loss of rental values during the testator's lifetime, and also such as resulted from the operation of the defendant's road subsequent to the testator's death, and can recover in one action in both capacities.*

No acquiescence, short of twenty years, will bar a party from complaining of a nuisance, unless by some act or omission he has induced the party causing it to incur large expenditures or to take some action upon which an estoppel may be based. Where a structure is authorized by law which, without such authority, would constitute a nuisance, the same rule applies, and a person whose property rights are taken may complain of a failure on the part of the railroad to offer him due compensation or to condemn his property under the right of eminent domain. *KNOX v. METROPOLITAN EL. RY. Co..... 517*

2. — *Effect of acquiescence in a trespass.] The mere failure to assert his rights while an elevated road is in process of construction does not preclude an abutting owner damaged thereby from maintaining an action for damages or an injunction, or operate as an estoppel against him. Id.*

3. — *Remedy.] The only remedy by which a party, under such circumstances, can obtain just compensation for the property taken, is by an action in equity to restrain the continuance of the trespass, and to deprive him of an injunction nisi would be to leave him remediless. Id.*

4. — *Inconsistent conclusions of law.] A judgment will not be reversed on appeal because of inconsistent conclusions of law, where the judgment*

RAILROAD — Continual.

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directed to be entered is in accordance with the correct conclusions of law on the facts found. *Id.*

5. — *Railroad company — right of, to run trains on any of its tracks, although the track used is immediately adjoining a dwelling-house and its use is peculiarly prejudicial thereto.*] The owner of a lot, one end of which abutted upon land used by a railroad company for its tracks, brought an action against the company, alleging that he had a house on the said lot; that the railroad, after it had been in operation many years, had constructed two additional tracks upon its land, which brought its tracks very near to the plaintiff's house; that sparks and smoke were thrown into the windows, and that the house was finally set on fire and so much injured as to be practically destroyed; that the defendant, the railroad company, drew heavy freight trains up this part of its road where the grade was very steep, and that such trains were frequently "stalled," and that in the effort to draw such heavy trains great showers of sparks were thrown out; and that there was an unlawful interference with his rights in laying the additional tracks near his house.

Held, that whether the railroad company should run its freight trains on one track or on another, or on the track nearest to plaintiff's house, was a question to be decided by the company itself, and that the jury had no right to say that the use of one or the other track was a negligent or improper use thereof.

That the company might lawfully lay its tracks on any part of the lands owned by it, and that, in the absence of further proof of negligence on its part, it was not liable for incidental damages arising from the location of its tracks.

That the fact that the defendant ran long and heavy freight trains on the track nearest plaintiff's house, and that more than one engine was sometimes required for running those trains, was no evidence of negligence on its part, nor was the fact that at times trains were "stalled" thereon.

FLINN v. N. Y. C. AND H. R. R. R. Co. 230

6. — *Board of Railroad Commissioners — power of, to give a certificate dispensing with the further extension of a railroad.*] Chapter 236 of the Laws of 1889, amending chapter 430 of the Laws of 1874, authorizing the Board of Railroad Commissioners to certify that the public interests do not require that a railroad corporation should extend its railroad beyond that portion thereof actually constructed at the time that title to the road has been acquired by it, is not an assumption of judicial power upon the part of the legislature, nor is it unconstitutional as conferring judicial power upon the Board of Railroad Commissioners. PEOPLE v. ULSTER AND DELAWARE R. R. Co. 236

7. — *An action by the people, to annul the corporation, does not preclude its so doing.*] The fact that an action has been brought and is pending on behalf of the people to annul the charter of the railroad corporation, because of its failure to complete its road in accordance with the requirements of its certificate of incorporation, does not affect the right or restrict the power of the Railroad Commissioners to give a certificate under such acts. *Id.*

8. — *Its reasons for so doing not reviewable.*] The courts have no power to pass upon the reasons given for the issuing of such a certificate by the Railroad Commissioners. *Id.*

9. — *Additional allowance — tax on franchise not a basis therefor.*] Evidence of the amount of taxes paid by the railroad company, under chapter 361 of the Laws of 1881, upon its corporate franchises, is not competent proof of the value thereof, nor does it afford a basis for determining the amount upon which an extra allowance may be computed. *Id.*

10. — *Appeal from orders in proceedings for railroad crossings.*] An order of the Supreme Court, appointing commissioners in proceedings to ascertain and determine the points of the crossings and intersections of the tracks of one railroad by another, affects a substantial right within the meaning of section 1356 of the Code of Civil Procedure. Such proceedings are not regulated by chapter 140 of the Laws of 1850. MATTER OF SARATOGA ELECTRIC RY. Co. 237

11. — *Allegation of the petition as to the consent of property owners.*] The petition of a railroad company incorporated under chapter 252 of the Laws

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of 1884, asking for the appointment of commissioners to ascertain the points of crossing another road, must allege that it has acquired the consent of one-half in value of the adjoining property owners and of the local authorities, to the construction of its road, in order to confer jurisdiction on the court to act thereon. *Id.*

12. — *Effort to agree.*] Negotiations relative to the crossing of one road by another, had with the general manager, vice-president and attorney of the road sought to be crossed, when such officers assume to negotiate for their company, and no notice is given to the person with whom they confer that they have not authority to act, constitute an effort to agree with such company within the requirement of the statute relating thereto. *Id.*

13. — *Railroad company — liability of, for the death of a passenger passing from one car to another while the cars were in motion.*] An action was brought to recover against a railroad company the damages resulting from the death of a passenger who, a short time after he had entered a passenger coach, on a train on the defendant's road, went into the smoking car, and after smoking a cigarette started to return into the passenger coach. While he was in the act of stepping from the platform of the smoking car to the passenger coach, in the rear thereof, the coupling between those two cars broke and the deceased was thrown down a steep gorge, over which the train was passing at the time, and was killed.

The jury found that the breaking of the coupling was caused through the negligence of the defendant.

Held, that the passenger, in the absence of instructions or notice from the company not to do so, only assumed, in going from one car to another while the train was in motion, the ordinary risks incident to such action on his part, and had a right to assume that the couplings and appliances were in a safe and proper condition, and that the railroad company was liable for the consequences of their not being so.

COSTIKYAN v. ROME, W. AND O. R. R. Co 590

14. — *Loss of a drawing-room car ticket — right of the passenger, notwithstanding the loss, to occupy the seat.*] A passenger, who had purchased a ticket entitling him to a seat in a drawing-room car from Saratoga Springs to the city of New York, having lost the ticket applied, to the agent who had issued it, for another. The agent declined to issue another ticket, but gave the passenger his personal card with the statement thereon: "This gentleman holds seat in 'Nokomis,' this P. M. Mislaid. C. E. Benedict." With this card and his passage ticket the passenger took his seat in the drawing-room car, and when called upon by the conductor for his drawing-room car ticket explained the facts and produced the card of the agent. No other person appeared to claim the seat in question, but the conductor of the car declined to accept the card of the agent, with the explanation offered, and informed the passenger that he must then pay for the seat or leave the car. The passenger declined to pay and went into a common car.

In an action brought by the passenger to recover the damages arising from his removal from the drawing-room car:

Held, that as no other person made claim to the seat in the drawing-room car, and the particular ticket issued therefor could not be used at any other time on this or any other car, the conductor should have acted on the report of the agent and have allowed the passenger to remain in his seat, and that the railroad company was liable for the damages resulting to the passenger by reason of his removal therefrom. BUCK v. WEBB..... 185

15. — *Railroad crossing where the view is obstructed — contributory negligence of one crossing the tracks — absence of flagman.*] A party crossing in a wagon the tracks of a railroad, which are so obstructed by embankments that it is impossible for him to see an approaching train before reaching the tracks, is, nevertheless, bound, after he gets to the tracks and in a position to see, to look up and down as far as he is able, and his failure to do so constitutes contributory negligence on his part.

The fact that a party injured upon a railroad had, at times, seen a flagman at the place where he was injured, in the absence of evidence that he had

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habitually seen a flagman there, does not justify his assuming, in the absence of the flagman, that it is proper for him to cross the tracks.

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16. — *Gate in a fence inclosing a railroad company's tracks — the company is not bound to keep it shut.*] Where a gate has been built, in accordance with law, by a railroad company, in the fence inclosing its tracks, for the use of the owner of the adjacent land, the railroad company is not bound, as between it and the landowner, to close the gate even though its officers have noticed that it is open.

Where the owner leaves the gate open, neither the owner nor his employees nor lessees have any right of action against the railroad company because of an injury to a horse which passes through such open gate onto the tracks of the railroad company and is injured.

DIAMOND BRICK Co. v. N. Y. C. AND H. R. R. R. Co. 396

17. — *Horse railroad — injury to one crossing its tracks — contributory negligence.*] A man sixty-one years of age started to cross a street after looking both ways, and while a horse car was fifty feet away. He crossed the first and second tracks of the horse railroad company, and got partly across the third track when he was struck by the horses attached to the car, was thrown under the wheels of the car and was fatally injured. The car was going faster than usual, and although the man was in full view of the driver its speed was not slackened.

Held, that the question of contributory negligence on the part of the deceased should have been submitted to the jury.

WELLS v. BROOKLYN CITY R. R. Co. 389

18. — *Flagman at railroad crossing — constitutionality of an order of court requiring it, under chapter 439 of 1884.*] The provisions of chapter 439 of the Laws of 1884, authorizing the Supreme Court or a County Court to order that a flagman be stationed at a railroad crossing upon a street, highway, turnpike or plank-road, where the same is crossed at the same level by a railroad, are not unconstitutional as delegating legislative power to the judges of these courts.

PEOPLE v. LONG ISLAND R. R. Co. 413

— *Common carrier — discrimination in its rates between different customers — a complaint, based upon a penal statute of another State, will not be sustained in the State of New York — common-law right.*

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REAL PROPERTY — *An administrator who negotiates a sale of the real estate of his intestate, conveyed by the deed of the heirs, is liable for the money received by him therefor and deposited in a bank which fails.*

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RECEIVER — *A corporation organized under chapter 425 of 1855, and chapter 394 of 1867 — power to mortgage its property to a director — enforcement of a mortgage foreclosure judgment against property in the hands of a receiver.]*

1. A corporation, organized under chapter 425 of the Laws of 1855, and chapter 394 of the Laws of 1867, has power to mortgage its property when authorized by a vote and by the consent of two-thirds of the stockholders.

The director of such a corporation is not prohibited from loaning money to it, and receiving from it security, in the form of a mortgage upon its property, for the repayment of the amount loaned, and under a foreclosure of such mortgage he may purchase in and obtain title to the property mortgaged

While a party having a judgment which is a lien upon property in the hands of a receiver, will not be permitted to take the property out of the possession of the receiver and sell it under an execution issued upon such judgment, yet a plaintiff, who has obtained a judgment of foreclosure of a mortgage, is differently situated and may sell the mortgaged property thereunder.

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A judgment, in an action brought by the attorney-general to dissolve a corporation on the ground that it has suspended its business for more than a year, provided that "nothing in this decree contained shall be deemed in any way to prejudice the legal rights of Charles Burhans under the mortgage held by him, and under the decree of foreclosure and sale heretofore made in an action brought by said Charles Burhans to foreclose said mortgage; * * * nor shall it be necessary for the said Charles Burhans or the said Robert Loughran to bring said receiver as a party into their respective actions; nor shall this decree operate as a stay in either of said actions of said Charles Burhans and Robert Loughran."

Held, that this provision of the decree was a permission, if any was needed, to Burhans to sell the mortgaged premises under his decree of foreclosure of the mortgage. **PRESTON v. LOUGHRAN**..... 210

2. — *Proceeds of a note sent to a bank for collection — when recoverable from the receiver of the bank.*] In an action brought to recover from the receiver of a bank the avails of a note which had been sent to it for collection, and had been collected by the bank, which failed immediately after such collection, it is necessary that the plaintiff should show that the avails of the note came into the hands of the receiver.

In case the proceeds of the note have been used by the bank prior to the appointment of the receiver, and are not represented in the assets in the hands of the receiver, the plaintiff is not entitled to a preference in the payment of his claim over other creditors of the bank. **FRANK v. BINGHAM**..... 580

3. — *Rent collected by a receiver, in advance, for a period extending beyond the date of the sale of the property — apportionment of the rent.*] A purchaser at a sale under mortgage foreclosure, where a receiver, appointed to collect the rents during the pendency of the action, has collected the rent in advance for a period extending beyond the day at which the sale takes place, is entitled to an apportionment of the rent so received by the receiver, and to be paid such amount thereof as covers the period of time subsequent to the sale.

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— *Agreement by the president of a corporation to postpone the enforcement of his claim against it — not enforceable by a receiver — consideration.*

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STALLION — *Lien for service by a stallion — upon a mare and colt in the hands of one purchasing the mare before the filing of a notice of the lien.*

See *TUTTLE v. DENNIS*..... 35

STATUTES — *Corporation — covered by the words "person or persons" in the lien law (§ 1824, chap. 410 of 1882) — error in the amount stated in the notice of lien to be due.*

See *GASKELL v. BEARD*..... 101

— *Public officer — acting under an unconstitutional statute — liability of, to an individual damaged.*

See *WATERLOO WOOLEN MFG. CO. v. SHANAHAN*..... 50

— *The personal property in the State of New York of a non-resident, domiciled in another State, is subject to a collateral inheritance tax.*

See *MATTER OF ROMAINE*..... 100

— *Assessment for street pavement under section 878 of chapter 410 of 1882 — a horse railroad company should be assessed for such work.*

See *PEOPLE EX REL. DAVIDSON v. GILON*..... 76

— *Constitutionality of.*

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STIPULATION — *Extending the time in which an appeal may be taken.*

See *BAGLEY v. JENNINGS*..... 56

— *Stipulating as to objections.*

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STREET — *Flagman at railroad crossing — constitutionality of an order of court requiring it under chapter 439 of 1884.*

See *PEOPLE v. LONG ISLAND R. R. Co*..... 412

— *In a city.*

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STREET RAILROADS:

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SUMMING UP — *Of counsel on a trial.*

See TRIAL.

SUPERINTENDENT — *Of the poor.*

See POOR.

SUPERVISORS — *Of counties.*

See COUNTY.

SUPREME COURT JUDGE — *The pension on his reaching the age of seventy years is not conditional on his having served ten years of the abridged term.*

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See PEOPLE EX REL. GILBERT v. WEMPLE..... 275

SURETY:

See PRINCIPAL AND SURETY.

SURROGATE — *Power of a surrogate, the successor of one who has admitted a will to probate, to certify a copy of the original will and to sign the record of probate.]* 1. Where a will has been admitted to probate by a surrogate, a certified copy of the original will on file in that office, made by a successor of the surrogate by whom such will was admitted to probate, as well as the signature of such successor to the record of the probate of the will, are made valid by chapter 155 of the Laws of 1890. *FETES v. VOLMER*..... 1

2. — *Variance between such copy and the record of the probate of the will.]* Where there is a variance between the record in the surrogate's office of a will admitted to probate therein and the record in the office of the county clerk, where a certified copy of such will has been recorded, the question as to which record is correct may be determined by a resort to the attending circumstances. *Id.*

3. — *Cannot, even with the consent of all parties in interest, admit to probate the will of a citizen of the State not a resident of his county.]* A surrogate has no jurisdiction to admit to probate in his court the will of a citizen of the State who is not a resident of his county.

Although all the parties interested in an estate give their consent to the probate of the will of the deceased by the surrogate of a county in which the deceased did not reside, and although the executors under the will accept letters testamentary based upon it, this does not give jurisdiction to the court.

MATTER OF ZEREGA..... 505

— *Will — when subscribed and signed "at the end" thereof.*

See **MATTER OF CONWAY**..... 16

— *Costs on the reference of a disputed claim against an estate.*

See **MATTER OF McQUEEN**..... 172

TAX — *Duty of the Comptroller of the city of New York to issue revenue bonds to pay the proportion of the State tax chargeable to that city — no deduction is proper, of the tax on the amount added to the assessed valuation by the State Board of Equalization, nor of the amount raised in the State tax levy and not appropriated, nor of the amount of a deficiency in the city tax levy to meet such bonds.]* 1. In a proceeding, instituted for the purpose of obtaining a *mandamus* to compel the Comptroller of the city of New York to issue and negotiate Revenue Bonds, and from the avails thereof to pay to the Treasurer of the State the amount owing for State taxes from said city for the tax imposed in 1889, it is no defense to the Comptroller that the Board of Estimate and Apportionment of the city of New York, in December, 1889, deducted from their estimate of the amount which was to be raised by tax to meet such Revenue Bonds, that proportion of the tax which was imposed upon an amount added by the State Board of Equalization to the assessed value of real estate in the city of New York; and also that proportion of the State tax which, it was claimed, had been imposed to meet several items in the State appropriation bill, which, after its passage by the legislature, had been vetoed by the Governor.

TAX — Continued.

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The amount certified by the Comptroller of the State of New York for the State tax in the city of New York, cannot be changed by the Comptroller of that city and made to conform to the appropriation made by the Board of Estimate and Apportionment of that city for that purpose; and the Comptroller of the city of New York is obliged to issue sufficient revenue bonds to enable him to pay from the proceeds thereof the amount of the State tax, although the Board of Estimate and Apportionment has not provided a sufficient amount in the tax levied upon the city to pay them.

MATTER OF ATTORNEY-GENERAL..... 218

2. — *Remedy.*] The Comptroller of the State of New York, under such circumstances, is not required to apply for a *mandamus* against the Board of Estimate and Apportionment to compel them to make a new assessment for a proper amount. *Id.*

3. — *Constitution, § 20, art. 3.*] A law imposing a tax, which is otherwise valid, is not impaired or rendered invalid under section 20 of article 3 of the Constitution of the State of New York by the fact that the appropriation bills, by reason of their reduction by the veto of certain items thereof by the Governor, do not appropriate all the money which will probably be received under such tax. *Id.*

4. — *Collateral inheritance tax — exemption therefrom — the legatee must be absolutely and unqualifiedly exempt from general taxation.*] Vassar College was authorized, by chapter 2 of the Laws of 1861, to take, by gift or devise, real and personal estate, the annual income of which should not exceed \$40,000, and, by chapter 39 of the Laws of 1862, the real and personal estate held by the college, to the extent that it was authorized to take the same by the act of 1861, was exempt from taxation.

Under the will of John Guy Vassar a bequest was given to the college.

Held, that such bequest was subject to the collateral inheritance tax provided for by chapter 483 of the Laws of 1885, as amended by chapter 713 of the Laws of 1887.

That, in order to exempt a legatee from the collateral inheritance tax, under the last-mentioned statute, there must be an entire freedom from general taxation.

That as Vassar College, under chapter 39 of the Laws of 1862, was only exempt from general taxation upon the property which it was authorized to take and hold under the law of 1861, that it did not come within the provision of the collateral inheritance tax laws relating to the exemption of certain legatees from the operation of those laws. MATTER OF VASSAR..... 378

5. — *Exemption from taxation — the New York Hospital.*] The New York Hospital was exempted, by chapter 466 of the Laws of 1875, from taxation upon its real and personal property in the city of New York, if no income was derived from it, and if the same was used exclusively for the purposes for which the hospital was created. This exemption was extended, under the provisions of chapter 462 of the Laws of 1889, to property of the hospital "wherever situated." The hospital had a farm in Westchester county, the products of which were used for the purposes of the hospital, except some insignificant quantities thereof, which were sold and the proceeds applied to the support of the inmates.

Held, that the farm was exempt from taxation, and that the sale of the few insignificant products thereof was not to be deemed a source of income.

That the hospital did not lose its right to exemption because it charged certain of the inmates who were able to pay.

PEOPLE EX REL. N. Y. HOSPITAL v. PURDY..... 386

6. — *Collateral inheritance tax — a child adopted under the laws of Massachusetts is not liable to.*] In February, 1878, a boy about two years of age was taken by one Butler from a charitable institution under an agreement on Butler's part to adopt him as his son, and, in 1884, he was formally and legally adopted by Butler, with the consent of his wife, under the laws of the State of Massachusetts, which are substantially the same as those of the State of New York. The boy lived with Butler for eleven years, and until the latter's death. He was treated as a son, and was given by his will some \$50,000.

TAX—*Continued.*

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Held, that this sum was not chargeable with the collateral inheritance tax under section 1 of chapter 713 of the Laws of 1887, amending chapter 483 of the Laws of 1885 of the State of New York.

That, to entitle an adopted son to exemption from this tax, it was not necessary that the proceedings for adoption should have been taken under the laws of the State of New York. **MATTER OF BUTLER** 400

7. — *The personal property in the State of New York of a non-resident, domiciled in another State, is subject to the New York collateral inheritance tax.* By the provisions of the statutes (chapter 483 of 1885, as amended by chapter 713 of 1887), relating to the collateral inheritance tax, the estate of a non-resident of this State, domiciled in another State, who dies in such latter State leaving no wife or children, and leaving personal property, consisting of bonds and stocks, deposited for safe-keeping within the State of New York, is liable to taxation thereon under such statutes.

The fiction of law that personal property, when the subject of taxation, attends the owner and has its situs at his domicile, must yield to the express provisions of the statute which imposes such tax upon the property of a non-resident. **MATTER OF ROMAINE**..... 109

8. — *The Board of Foreign Missions and Board of Home Missions of the Presbyterian Church are not exempt from the collateral inheritance tax.* The Board of Foreign Missions of the Presbyterian Church, created by chapter 187 of the Laws of 1862, is liable, under chapter 483 of the Laws of 1885, to the collateral inheritance tax upon a legacy bequeathed to it, as such board is not exempt from taxation by the act under which it is created, nor does it fall within any of the general classes of exemption from taxation specified in the general statutes of the State.

The Board of Home Missions of the Presbyterian Church created by chapter 287 of the Laws of 1872, is also liable to such collateral inheritance tax for the same reason. **MATTER OF BOARD OF FOREIGN MISSIONS**..... 116

— *Landlord and tenant—right of a tenant, evicted for non-payment of a tax, to tender payment of the tax and be restored to possession under section 2256 of the Code of Civil Procedure.*

See **WITTY v. ACTON** 552

— *Insurance company—when a "surety company" is an insurance company and subject to a tax on its premiums.*

See **PEOPLE EX REL. AM. SURETY CO. v. WEMPLE**..... 248

— *Additional allowance—tax on franchise not a basis therefor.*

See **PEOPLE v. ULSTER AND DELAWARE R. R. CO.**..... 266

TENANCY—*In its relation to tenure under a lease.*

See **LANDLORD AND TENANT**.

TICKET—*On railroad—loss of—right of the passenger.*

See **Railroad**.

TITLE—*Lis pendens—When canceled by order of the court—notice.*

See **VALENTINE v. AUSTIN**..... 898

— *To real property.*

See **REAL PROPERTY**.

TOWNS—*Negligence—town highway out of repair—acts and declarations of the highway commissioners subsequent to the accident, how far evidence against the town—evidence as to the subsequent repair of the highway.*

See **STONE v. TOWN OF POLAND**..... 21

— *Supervisor—right to compromise an action although the judgment therein is chargeable to the town—right of the town to order an appeal to be taken.*

See **HULBURT v. DEFENDORF** ... 585

TRADE-MARK—*Evidence—denial of knowledge as to incorporation—trade-mark—proof required in an action to prevent its use.*

See **VULCAN v. MYERS**..... 161

TRAMPS:

See **POOR**.

TRAM-WAY COMPANY — *Eminent domain — what must be shown by a tram-way company seeking to acquire land — what is not a public use.*

See **MATTER OF SPLIT ROCK CABLE CO** 851

TRESPASS — *Effect of acquiescence in a trespass — remedy.*

See **KNOX v. METROPOLITAN EL. RY. CO.** 517

TRIAL — *Discussing before the jury the defendant's failure to go upon the stand in a criminal case — is ground for a new trial.* 1. Upon the trial of a person accused of crime the district attorney has no right to discuss before the jury the refusal of the defendant to go upon the witness stand; and when such remarks are made and objected to, either in the opening or summing up of the case, and no attempt is made by the court to repair the damage done by cautioning the jury in this regard, the defendant will be awarded a new trial upon appeal.

Such action upon the part of the district attorney is a clear violation of law and prejudicial to the defendant, putting him in a false position before the jury and compelling him to testify when otherwise he might not have done so.

PEOPLE v. DOYLE 535

2. — *Felonious intent in grand larceny — evidence as to.* On the trial of a prisoner, charged with grand larceny in the first degree, it is necessary that the prosecution should establish a felonious intent upon the part of the prisoner, and where the offense consists in drawing out from a bank money which had been deposited there in the names of the prisoner and another party, since deceased, it is error to exclude evidence as to statements made by such deceased party prior to his death, in reference to his having made a gift of the money belonging to him in the bank to the prisoner, even though such gift may have been ineffectual in law, as the evidence would be pertinent upon the question of intent. *Id.*

3. — *Jury — need not be thoroughly satisfied in a civil action — when the sheriff's negligence or fraud discharges the obligation of a bond of indemnity.* In an action brought to recover upon a bond of indemnity, given to protect a sheriff in seizing certain property under an execution, the judge charged the jury, in reference to the conduct of the auctioneer who had been employed by the sheriff to sell the property: "I think it fair to say to you that you ought to be thoroughly satisfied that the conduct of the auctioneer was not merely negligent or careless — not a mere oversight. Before concluding the sheriff should lose his indemnity, because of the auctioneer's acts, you should be quite satisfied that the latter was acting in bad faith."

Held, that the court, in stating to the jury that they should be thoroughly satisfied, gave them an incorrect standard as to the conclusiveness of the proof required, that in a civil action the jury need not be satisfied of any fact claimed to be proven; that if there is a preponderance of evidence in favor of the fact, they are bound to find accordingly whether they are thoroughly satisfied or not; that the charge was also incorrect in stating that fraud must be shown in order that the indemnity should be lost.

O'DONOHUE v. SIMMONS 467

4. — *When a case should be submitted to the jury, although the evidence is uncontradicted.* Although the general rule is that where a witness testifies distinctly and positively to a fact, and is uncontradicted, his testimony should be credited, yet where the witness, called to prove the defendant's case, was the husband and agent of the defendant, having an interest in the success of the defense, in fact a party to it, the court is bound, under this condition of the evidence, to submit the case to the jury. **ROSEBERRY v. NIXON** 121

5. — *Right to withdraw a counter-claim upon a trial before a referee.* Upon the trial of an action before a referee the defendant may withdraw a counter-claim set up in his answer, in the same manner that the plaintiff may submit to a nonsuit on a trial at circuit, up to the time that the case is submitted to the jury.

When a counter-claim is thus withdrawn, it is improper for the referee to make any adjudication upon the merits thereof. **BROWN v. BUTLER** 511

— *Negligence of a child in whose charge a younger sister is at the time of an accident to the latter — how far it bars the recovery of damages.*

See **WILLIAMS v. GARDINER** 508

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— *Complaint for embezzlement and fraudulent misapplication of money — proof required of the plaintiff — exception to a charge to the jury bringing in a sealed verdict.*

See PANAMA R. R. Co. v. JOHNSON..... 557

— *Appeal from an order denying a motion for a new trial, unnecessary in a criminal action — misconduct on the part of the jury requiring that a new trial be granted.*

See PEOPLE v. SCHAD..... 571

— *Removal of a clerk in the New York police department — no trial is necessary — notice to the clerk of the charge is required.*

See PEOPLE EX REL. BRANT v. MCLEAN..... 152

— *Negligence — when a question for the jury.*

See TONNESON v. SANFORD..... 415

— *Policeman — when tried entitled to counsel.*

See PEOPLE EX REL. VAN HISE v. POLICE COMRS..... 224

— *Place of.*

See VENUE.

TRUSTEE — *Of a mortgage acting in bad faith to the bondholders — injunction.*

See GIBSON v. AMERICAN L. AND T. Co..... 448

— *Of corporations.*

See CORPORATIONS.

TRUSTS — *Action for an account of the management and sales of land in another State — when it is not necessary to allege that the defendant has money belonging to the plaintiff.]* 1. An action was brought to compel the rendering of an account by the defendant concerning the management and disposition of certain lands situate in the State of California, as to which a contract had existed between the plaintiff and defendant, by which certain of the lands were to be conveyed by the plaintiff to the defendant, and other lands were to be acquired by the defendant under the purchase and foreclosure of a mortgage thereon, all of which property the defendant was to sell, at such time as he deemed advisable, and after repaying to himself the amount expended by him was to pay to the plaintiff one-third of any excess over and above the same, and to himself retain the other two-thirds.

The plaintiff alleged that the land was conveyed by her pursuant to the contract with the defendant, and that other property was purchased under a mortgage foreclosure as contemplated by the contract, and that defendant thereafter had sold said lands, or part thereof, and out of the proceeds of said sale had retained all money expended by him in the purchase, and all disbursements made in connection with such lands, but had failed to account for and pay over to the plaintiff one-third of the excess of the moneys received, and demanded judgment for an account of the dealings and transactions of the defendant under his contract, and of the moneys received and expenditures made by him, and that he pay to her such sum as might be found to be due to her.

To this complaint the defendant interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action.

Held, that while the complaint did not allege, unless by way of inference, that the defendant had money arising from the execution of the trust created by the agreement, which should be paid over by him to the plaintiff, that, nevertheless, the plaintiff was entitled to a full and clear exposition and statement of what had been done by the defendant in the management and disposition of the estate.

That it was not indispensable that the plaintiff should allege that the defendant had funds in his hands, obtained from the property, which he should pay to her. READING v. HAGGIN..... 450

2. — *Jurisdiction of the courts of the State of New York.]* It was further objected that the complaint stated no cause of action, within the jurisdiction of a court of the State of New York, for the reason that the lands were situate in the State of California, and their management was confined to that State.

TRUSTS — Continued.

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Held, that as to the question relating to the conduct of the defendant in the management and disposition of the lands, and the uses made by him of their proceeds, that the courts of the State of New York had jurisdiction over the subject-matter of the action. *Id.*

3. — *Delivery of trust deeds — presumed from their acceptance by the trustee and recording, though afterwards found in the grantor's possession.*] A testator stated in his will that he had already provided for his three children by an insurance on his life, and by trust deeds made on the 10th day of March, 1887. It appeared that these deeds had each been executed and acknowledged by the trustee, who accepted the estates thereby granted, and the trust thereby created and declared, and covenanted faithfully to perform the same, and that such deeds were recorded on the 11th day of March, 1887.

Held, that these facts were sufficient to support the inference, although the deeds were in the safe of the grantor at the time of his decease, that they had been delivered to the trustee at the time when they were executed.

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4. — *When not void as made in contemplation of marriage*]. It was not shown that the property described in the deeds had been conveyed in contemplation or expectation of marriage, or that the grantor was even acquainted with the person whom he subsequently married when the deeds were executed, acknowledged and recorded.

Held, that they could not be adjudged fraudulent as against her for the reason that she was thereby deprived of an estate in dower in this property. *Id.*

5. — *Effect of subsequent representations and possession of the property by the grantor.*] That as the title had become vested in the trustee prior to any negotiations or conference between her and the grantor on the subject of marriage, neither the assertion of title by the grantor before or after his marriage with her, nor his continued control of the property could be attended with such effect.

That the representation of the grantor, that he was the owner of the property, could not divest the trustee of the title to it or subject it to rights or equities in favor of the grantor's wife.

That in view of the fact that, under the terms of the trust, the trustee was directed to apply the net rents and profits to the grantor's use during his life, the fact that the grantor remained in possession of the land described in the deeds, after his marriage and until his death, was not inconsistent with the trust or the delivery of the deeds. *Id.*

6. — *For the benefit of the grantor and others — invalid as against the creditors of the grantor to the extent of his interest only.*] One Birdsall executed a deed of trust to trustees by which he conveyed his property, both real and personal, in trust, first, to sell so much as should be necessary to pay all the just debts of the grantor; second, to manage or sell the residue of the lands; third, during the natural lives of the grantor and his wife, or the survivor of them, to dispose of the interest upon the net proceeds of the real and personal property by first paying the grantor an amount sufficient to clothe, support and maintain him, and such other allowance as the trustees should in their discretion deem proper, and by dividing the remainder equally between the grantor's wife and his daughter.

When the daughter attained the age of twenty-one years one-third of the trust estate was to become hers absolutely, the other two-thirds to remain in the hands of the trustee, the income to be distributed as above stated during the lives of the grantor and his wife. On the death of either another third of the estate was to become the absolute property of the daughter, and upon the death of both the grantor and his wife the daughter was to have the whole estate.

Two days thereafter Birdsall's wife executed to the same trustees a like deed of trust of all her property, both real and personal.

Held, that as the primary object of each deed, or one of the primary objects thereof, was to transfer the property of the grantor to trustees, in trust for the support and maintenance of such grantor, it was void, under 2 Revised Statutes (135, § 1), as against the creditors, so far as that particular trust was

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concerned, but was valid, as against the creditors of the grantor, so far as the trusts for the benefit of others were concerned.

That the trusts which were valid did not fail, because the instrument creating them also contained a trust that became invalid when the separate rights of creditors were invaded.

Semble, that a transfer does not come within the provisions of this statute, and is not made invalid thereby, where the use of the interest reserved to the grantor is merely incidental and partial, and is to vest or result after the execution of some active and lawful purpose for which the trust was primarily made. **SLOAN v. BIRDSALL** 817

7. — *Statute of limitations applicable to a claim which the trustee is directed to pay, where payment thereof is refused by him.*] One Birdsall having executed a deed of trust conveying certain property to trustees, one of the purposes of which trust was to pay all the just debts of Birdsall, a creditor of Birdsall presented to the trustees for payment a claim, payment of which was refused by them in December, 1868. The claim was again presented and payment refused in 1875, and again in 1880. Thereafter, and in May, 1888, an action thereon was brought against the trustees.

Held, that the claim was barred by the statute of limitations; that even if a direct, positive and technical trust, such as belongs exclusively to the jurisdiction of a court of equity, existed in favor of the claimant, the statute of limitations commenced to run against the plaintiff's debt from the time when payment was refused by the trustees.

The rule which exempts such a trust from the bar of the statute of limitations is subject to two qualifications:

First. That no circumstances exist to raise a presumption from the lapse of time of an extinguishment of the trust.

Second. That no open denial or repudiation of the trust is brought home to the knowledge of the *cestui que trust*, which requires him to act as in the case of an asserted adverse title. **HILL v. McDONALD**..... 822

UNDERTAKINGS — Other than on appeal.

See BONDS.

VAGRANTS — Law relating to.

See POOR.

VASSAR COLLEGE — Collateral inheritance tax — the legatee must be absolutely and unqualifiedly exempt from general taxation.

See MATTER OF VASSAR..... 878

VENDOR AND PURCHASER — Reservation of all claims for damages, accrued and to arise to the land conveyed, resulting from the operation of an elevated railroad — what owner is affected thereby.

See FOOTE v. MANHATTAN RY. CO..... 478

— *Deed in which the grantee assumes payment of a mortgage on the premises conveyed — when the grantee (although his grantor was obligated to pay the mortgage), cannot be sued by the mortgagees.*

See WAGER v. LINK..... 873

— *Rent collected by a receiver, in advance, for a period extending beyond the date of the sale of the property — apportionment of the rent.*

See COWEN v. ARNOLD..... 437

VENUE — Change of — not prohibited in an action for penalties under the game law, chapter 577 of 1888.] The provisions of section 8 of chapter 577 of the Laws of 1888, relating to suits for the recovery of penalties for violations of the game law, to the effect that "such suits shall be commenced on the order of any game and fish protector, in the name of the people, by any district attorney, where the offense shall be alleged to have been committed, or by the district attorney of the adjoining county, and such suits shall be prosecuted to determination in the county where they shall be commenced, unless for a good cause appearing a discontinuance shall be directed by the

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chief game and fish protector," do not prevent the Supreme Court from changing the venue in actions where the convenience of witnesses or the ends of justice demand it. *Phoria v. Courtney*..... 245

VESSELS:

See SHIPPING.

VESTING—Of an estate in real property.

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VILLAGES:

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[Look, also, under the name of the particular city.]

VOLUNTARY PAYMENTS:

See PAYMENT.

WAGE CONTRACT:

See CONTRACT.

WILL—Equitable conversion of real estate into personalty.] 1. A testator, by his will, provided as follows: "I do hereby authorize and empower my executors, or a majority of them, as soon as convenient after the death of my wife, to sell and dispose of my real and personal estate of which I may die seized, on such terms as to the said executors, or a majority of them, shall seem just and proper, within three years after my wife's death." And further provided: "I hereby authorize and empower my executors, or a majority of them, as soon as convenient after my decease, to sell and dispose of my real estate of which I may die seized, on such terms as to the executors, or a majority of them, shall seem just and proper, within three years from my death; and until said real estate is sold I hereby authorize my executors to take charge and supervision over it and the avails of the said real estate, together with such balances as shall remain of my personal property after all debts, charges, funeral expenses and legacies are paid off as provided for, together with all expenses and charges of executing this will."

In an action brought to obtain a construction of the will it was claimed by a beneficiary named therein that, under the aforesaid provision of the will, upon the principal of equitable conversion, the real estate of the testator must be deemed to have been converted into personal property.

Held, that as it was no where made the duty of the executors to sell the real estate, and as it did not appear that the testator intended that the same should be sold by them in any event, that the doctrine of equitable conversion was not applicable. *Frasier v. McNamarron*... 30

2. — When an estate, given "at the death" of the testator's wife and conditional upon its continued use by the devisee, vests.] By his will a testator provided: "At the death of my wife I give and devise all that part of my real estate situate in the said town of Southeast * * * to the Baptist Church and Society of Dykeman's Station, to be used by said church and society as a parsonage forever; and whenever said society ceases to use the same as a parsonage, the same shall revert to my heirs-at-law."

Held, that the remainder did not vest in the church or society during the life of the wife.

That as the devisee could not alien or dispose of the property, and could have no advantage of the devise until after the death of the wife, and there could be no right of property apart from the right of enjoyment, the devise was necessarily contingent upon the existence of the devisee at the termination of the estate of the wife, and was not intended to operate until that time, and that the church or society was entitled to take under the will in case it should then be incorporated. *Loughheed v. Dykeman's Baptist Church*..... 364

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3. — *When subscribed and signed "at the end" thereof.]* A testator wrote his will upon a half-sheet of legal cap paper, upon the first or front page of which was written the will down to and including the following words, in parenthesis, namely: "(Carried to back of will.)" Upon the top of the back of the sheet was written the word "(continued)." Following which were the remaining provisions of the will, to and including the words "signature on face of the will." All the rest of the will, including the appointment of the executor, the signature of the testator, the attestation clause, signed by the witnesses; and the signatures of the witnesses were filled in, in a printed blank, upon the lower part of the first page of the sheet of paper, following the words written thereon—" (carried to back of will)."

Held, that the will was subscribed by the testator, and signed by the witnesses "at the end of the will," in accordance with the provisions of the statute. *MATTER OF CONWAY*..... 16

4. — *Action for an accounting and the construction of a will by the executors and trustees thereof—questions arising between a legatee and his assignee may be determined in such an action.]* In an action brought by executors and trustees under a will for a final settlement of their accounts, and to obtain a construction of the will, the assignees of a legatee under the will are properly made parties, and their rights, as against such legatee, may properly be determined in such action. *BARNES v. BLAKE*..... 525

5. — *Misjoinder.]* It is not a misjoinder of causes of action to state in such a complaint a claim made by such assignees against the legatee. *Id.*

6. — *Directing that the estate "be divided among my heirs-at-law"—who entitled thereto.]* A testator, by his will, provided as follows: "Secondly. I order and direct that my estate be divided amongst my heirs-at-law, in accordance with the laws of the State of New York, applicable to persons who die intestate."

Held, that, under this provision of the will, the real property left by the deceased passed to his heirs, in accordance with the statute of descent, and the personalty was to be distributed among the next of kin in accordance with the statute of distributions. *LAWTON v. CORLIES* 566

— *Power of a surrogate, the successor of one who has admitted a will to probate, to certify a copy of the original will and to sign the record of probate—variance between such copy and the record of the probate of the will.*

See FETES v. VOLMER..... 1

— *Surrogate—cannot, even with the consent of all parties in interest, admit to probate the will of a citizen of the State not a resident of his county.*

See MATTER OF ZEREGA..... 505

— *The personal property in the State of New York of a non-resident, domiciled in another State, is subject to a collateral inheritance tax.*

See MATTER OF ROMAINE..... 109

— *Probate.*

See SURROGATES.

WITNESS—*Discussing before the jury the defendant's failure to go upon the stand in a criminal case—is ground for a new trial—felonious intent in grand larceny—evidence as to.*

See PEOPLE v. DOYLE..... 535

— *Evidence as to personal transactions with a person, since deceased, as to his having been present—privileged communications to an attorney.*

See GREER v. GREER..... 251

— *A plaintiff avoiding service of an order—will not be heard on a motion to vacate it.*

See DUDLEY v. PRESS PUBLISHING Co...... 181

WRIT—*Of certiorari.*

See CERTIORARI.

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